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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1935.

No. 34.

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

Opinions Below.

The opinion of the District Court upholding petitioners, title [R. 161] is reported in 5 Fed. Supp. 281, and the opinion of the Circuit Court of Appeals reversing the decree [R. 715] is found in 74 Fed. (2d) 901.

Questions Presented.

1. Whether the United States Land Department has jurisdiction to survey and establish the ordinary high water mark constituting the boundary between upland of an island belonging to the public domain and state tideland bordering said island;

2. Assuming such jurisdiction, whether the patent of the United States which conveyed the said island "according to the Official Plat of the Survey of said lands" is conclusive evidence of the correct location of the boundary between the upland and adjoining tideland, within the purview of *Knight v. United Land Association,* 142 U. S. 161; *Cragin v. Powell,* 128 U. S. 691; and other applicable rulings; or whether the matter is always open for independent reexamination in the courts;

3. The United States Deputy Surveyor having been specifically instructed to note "the height of the Island above high water mark, and the area of arable lands thereon" and having reported in his field notes that his survey stations were located "at ordinary high water mark", that he had "meandered around the island at ordinary high water mark" and that the island was "from 3 to 5 feet above ordinary high tide", is the patent (based upon such survey and plat made from it), conclusive evidence that the stations or meander corners of the survey were correctly located at ordinary high water mark, there being no claim of fraud in the survey;

4. The official plat of said survey having shown as the only boundaries of said island, traverse lines drawn between such meander corners, do said traverses, as matter of law, constitute merely meanders,—the parties in effect

having agreed and the trial court having found that they were boundaries;

5. Is "ordinary high water mark", which defines the boundary between upland and tideland, determined

(a) by the physical marks impressed by the waters upon rocks, earth and vegetation; or

(b) by the line of the neap tides in accordance with the decisions of the California Supreme Court, such as *Teschemacher v. Thompson*, 18 Cal. 11, 21, and *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 313; or

(c) by a contour representing the line of mean high tide, which is .8 foot higher than the mean of the neaps.

6. Can an appellate court, without examining the sufficiency of plaintiff's proofs, properly reverse a quiet title (or ejectment) action upon the ground that a counterclaim asserting defendants' title has not been adequately proved, where the denials of plaintiff's title raise the same issues as the counterclaim?

7. Does the instant record not require an affirmance of the District Court's decree upon the grounds:

(a) that plaintiff failed to allege or prove a case according to its own legal theory;

(b) that there was no substantial competent evidence to overthrow the factual finding that the demanded premises were never tideland;

(c) that the admissions of the pleadings establish an estoppel *in pais* against plaintiff's maintaining the action, as well as

(d) the bar of a judgment growing out of a dismissal of a former action under circumstances constituting a retraxit?

Statement.

This action was brought in the state court of California by the respondent, City of Los Angeles, for recovery of the greater portion of Mormon Island in Los Angeles Harbor, upon the theory that the demanded premises were tideland at the time of admission of the State of California into the Union on September 9, 1850, and at the time of patenting of said lands by the United States to William Banning on December 30, 1881. Respondent claims title, as successor to the State, under a statutory tideland grant of May 1, 1911 [Cal. Stats. 1911, p. 1256; R. 7], quoted at page 16, *infra*.

Cast in the form of a suit to quiet title, the action, brought by one out of possession, was strictly at law; but, after removal to the Federal Court, it was treated by the parties and the Judge in most respects as a proceeding in equity.

The trial judge found, as a fact, that the disputed area never was tideland [R. 174, 184], and decreed that petitioners' title be quieted against respondent's claims. He proceeded primarily upon the legal theory that the Federal patent under which petitioners claim conclusively determined the boundary location. The Circuit Court of Appeals reversed the decree because of its mistaken view that the Land Department had no jurisdiction to survey boundaries of public domain where adjoining tideland and that the patent, or the survey on which it was based, fixed no boundaries whatever; that court declined to review the sufficiency of the other facts to sustain the finding, because it conceived the trial judge to have reached a decision through an erroneous process of reasoning—thus

overlooking the cardinal rule that a judgment will be affirmed, if correct, regardless of the accuracy of the trial judge's mental processes.

UNCERTAINTY OF LOCATION OF HIGH WATER MARK PRIOR TO 1880 SURVEY.

At the time of admission of California on September 9, 1850, there was situated in San Pedro Bay (a navigable tidewater, now Los Angeles Harbor), an island known as Mormon Island, which concededly [R. 44, 111] constituted a part of the public domain of the United States and which was never surveyed until May 22, 1880 [R. 165-166.] Hence there had been no official determination by any tribunal of the area or boundaries of the island. And it was, prior to said date, an open question of fact whether all or any of the land now claimed by respondent constituted tideland or upland. This is important, for the main contentions of respondent (plaintiff and appellant below) rest upon the *assumption* and *assertion* that the land claimed by it was known to be tideland at the time of the Norway survey of May, 1880, and that there was hence a complete want of jurisdiction in the Land Department's survey of the premises which are described in paragraph XII of the complaint [R. 9],—a want of jurisdiction rather than an error in the exercise of existing jurisdiction over the subject matter.

The discussion must start then with a parcel of land which constituted a portion of the public domain, the area and boundaries of which had never been determined prior to the Norway survey.

Proceedings Culminating in Patent.

In May, 1880, W. H. Norway, United States Deputy Surveyor, acting pursuant to a contract [R. 662] with Theodore Wagner as Surveyor General of the United States for California, commenced a survey of the said island. The contract required Norway "in strict conformity with the printed Manual of Surveying Instructions, * * * and with such special Instructions as he may receive from the Surveyor General" to "well, truly and faithfully run, measure and mark *all lines** necessary *to survey* and connect with the lines of public surveys, the *tract of land* in Township 5 South, Range 13 West, San Bernardino Meridian, known as 'Mormon Island,' and supposed to be in the N. W. ¼ of Section 8 of said township" [R. 663]. As this referred to an island, the surveyor *could comply only by delineating the high water mark; there were no other boundaries.* Through said Surveyor General the Commissioner of the General Land Office required Norway, in executing the survey, "to note the width and depth of the channels upon either side of the Island, the *height of the Island above high water mark,* and the area of the arable lands thereon" [R. 671.] The survey was completed on May 24, 1880. Norway returned to the Surveyor General his field notes [R. 683-5] which stated that his meander corner No. 1 was established at "ordinary high water mark" and that he did "meander around the island at ordinary high water mark", giving his stations, courses and distances, and further saying: "Said *Mormon Island is from 3 to 5 feet above ordinary high tide* * * * The area of available land is about 18 acres as indicated in field notes of Survey" [R. p. 685],

*All italics ours unless otherwise indicated.

the exact amount indicated therein being 18.88 acres [R. 684]. The Surveyor General, on August 26, 1880, attached to said field notes a certificate that the same had been "critically examined, and the necessary corrections and explanations made, the said field notes and the surveys they described are hereby approved" [R. 687]; he also on said day attached to a plat of the said Norway survey a certificate that the same "is strictly conformable to the field notes of the surveys thereof on file in this office, which have been examined and approved"; a copy of the said plat, Exhibit "D", is found in Vol. 2 of the Record,—the "Book on Exhibits", p. 31. It is alleged [R. 47], admitted [R. 112], and found [R. 170], that the plat or map filed with these field notes was one "showing the location, area *and boundaries* of same, as surveyed by the said Norway.". On November 12, 1880, the Commissioner of the General Land Office found that "The returns of survey made of Mormon Island * * *, under his contract * * * have been *found correctly surveyed*", and authorized filing with the Register of the proper Land Office of the plat as approved by the Surveyor General on August 26, 1880. [R. 673]; the said Mormon Island was officially designated as Lot One of Section 8, of Township 5 South, Range 13 West, San Bernardino Meridian [R. 168.]

No appeal from the action of the Commissioner in approving the said survey and plat or any other objection thereto was taken or made by the State of California or any other person whomsoever. [R. 168.]

The plat having been duly filed, a patent was on December 30, 1881, issued by the United States, pursuant to the preemption laws then in force, to William Banning, conveying to him "lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, *according* to the *Official Plat* of the Survey of the said Lands, returned to the General Land Office by the Surveyor General" [R. 169, 660.]

PERTINENT ADMISSIONS OF RESPONDENT.

Counsel for respondent, in his opening statement at the trial, conceded "that in 1881 a patent was issued to *these lands*, or purported patent was issued to *these lands* to William Banning" [R. 187,] and contended "that there was only a small portion of that land which was *described in the patent* that was upland * * * and that the rest *of it* was tideland." [R. 211.] Appellant's brief in the Circuit Court contained these admissions:

> "The lands involved in this action and described in paragraph XII of appellant's bill of complaint form *a part of Mormon Island.*" (page 1);
>
> *"The land involved in this action* and described in paragraph XII of appellant's bill of complaint *is a portion of the land described in the patent issued to William Banning.*" (page 4);
>
> "Appellant *admits* that the patent was issued to William Banning and *that the lands involved in this action* and described in paragraph XII of the bill of complaint *were a part of the area described in said patent.* (page 9).

Borax Consolidated, Limited, in 1923 [R. 690], succeeded to Banning's title to the northerly portion of the island, purchasing same in the belief that all the land conveyed to it constituted upland and having "no reason to believe that any portion thereof was tideland" [R. 55, 117]. It was conceded at the trial that petitioner has good title to the demanded premises except to such extent as same may be determined to be tideland [R. 212, 637, 689]. Pacific Coast Borax Company is merely the agent of the other petitioner, in possession of the disputed lands. [Finding R. 173].

ACTION A COLLATERAL ATTACK ON PATENT.

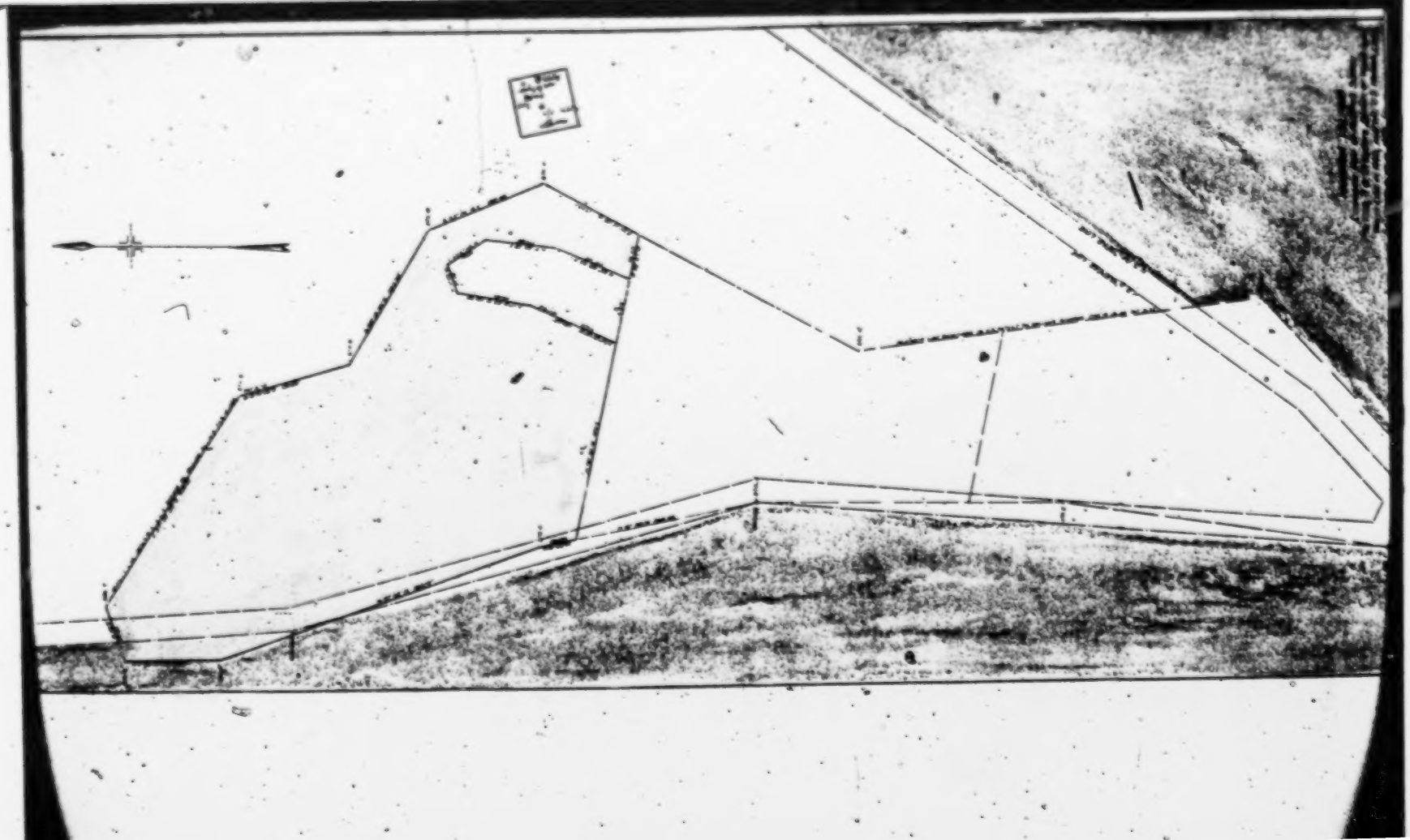
The instant action was brought for recovery of the greater portion of the land so acquired by petitioner. It is a collateral attack upon the Federal patent [Finding, R. 170] under which petitioners claim title. [Finding, R. 171-3]. The complaint shows the patent to be the origin of defendants' title [R. 12], asserts the invalidity of the same on the ground that the "said lands at the time of the issuance of the said *pretended* patent or grant were not and no part thereof was public property of the United States * * * and the United States has not had at any time since September 9, 1850, jurisdiction to patent or grant or transfer said lands to said William Banning or to anyone else" [R. 12], and that therefore "said *attempted* patent or grant or conveyance *of said lands* or any part thereof was inoperative and *void and conveyed no title* whatsoever" [R. 12]. Plaintiff prays that its title be adjudged valid and that the claims of defendants be decreed to be "unlawful, invalid and without any right whatsoever" [R. 13].

Plaintiff's allegation that the demanded premises constitute tidelands [R. 8] was put in issue by the denials of the answer [R. 34, 715], which also contained, through an excess of caution, a "first, separate defense and * * * counterclaim" [R. 44], alleging with particularity the Government patent and defendants' title based thereon [the same issue raised in the traversing portion, at R. 34, 37], and prayed [R. 93] that plaintiff take nothing by its bill and that defendants' title be quieted, etc.

The Real Issue.

Copy of Plaintiff's Exhibit 2, opposite this page, reveals the true issue. It represents the northerly end of the island. The disputed area is colored; the City concedes the white portion to be upland and claims all of the surrounding colored portion (which is wholly within the confines of the Norway survey) to be tideland [R. 210]. Norway's corners, as well as his traverses, are completely rejected [Finding, R. 170]. *But no fraud is claimed with respect to the survey.*

The complaint avers a continuous condition from September 9, 1850 [R. 8, 12], and the point was clearly developed at the trial; respondent there made *no claim of changes in the island boundary after the survey* [R. 322-4]. Likewise respondent *abandoned any effort to define the sinuosities of the shore* between meander corners [R. 209-11, 213, 321; Finding R. 170].



RESPONDENT CONFUSES WANT OF JURISDICTION AND ERROR IN ITS EXERCISE.

The first counterclaim alleges [R. 45] and the reply, although denying the application of the rule to the demanded premises, admits [R. 111-112] "That is was at all times the duty of the Commissioner of the General Land Office, in said Department of the Interior, and he was by statute vested with jurisdiction, to determine from time to time the location, quality, area *and boundaries* of the public lands of the United States, and to that end to cause the same to be surveyed and plats thereof made, approved and filed as public records of the United States". Such was the law without any admission by the parties, and the corollary to it is that the jurisdiction is vested exclusively in the Land Department, not in the courts. It is well settled that determination of facts by the Land Department pertaining to an inquiry within its jurisdiction is conclusive; which means not subject to review by the courts. The practical aspect of this was recognized in the remarks of the trial judge at R. 635.

It is apparent that respondent has conceded the jurisdiction of the Land Department over the *subject matter* of delimiting Mormon Island. The Department having jurisdiction over the subject matter, error, if any, in determining one or more of the facts involved in the inquiry would not destroy existing jurisdiction to make that inquiry and to determine the facts.

On this, which was made the main question on appeal and the primary subject of discussion in the opinion of

the Circuit Court of Appeals, there is a manifest confusion, on the part of counsel for respondent and the Circuit Court, between an error in the exercise of jurisdiction and a total want of jurisdiction over the subject matter,—a distinction which was clearly perceived by the trial judge [See R. 634-5].

The Decision of the Trial Court.

The trial court in a written opinion [R. 161] held the patent to be conclusive evidence of the true location of the boundary line and for this reason confined the findings to "issues raised by the complaint *and denials* of the answer, and by defendants' first counterclaim and denials of the reply thereto". [R. 185]. But it made findings [R. 165] and entered a decree [R. 178] to the effect that the disputed premises are not and never have been tideland [R. 174, 184] and that the title of Borax Consolidated, Limited, be quieted against all claims and pretensions of the City of Los Angeles. [R. 184].

Essence of Circuit Court Ruling.

The Circuit Court of Appeals reversed this decree, holding: (1) that the Land Department had no jurisdiction to determine the boundaries of public domain where abutting upon State tideland unless specifically so authorized by statute; (2) that *Knight v. United Land Association,* 142 U. S. 161, is not in point because of (a) the factual circumstance that it involved the boundaries of a Mexican grant and (b) the erroneous assumption that the survey proceeded under statutory sanction more specific than did that of Norway; (3) that the

"meanders" of the Norway survey and the meander corners, as matter of law, did not and could not constitute boundaries or boundary monuments, that they have no significance except to determine purchase price, and that the line of high water mark is open to independent recanvassing by parol fifty-five years after the severance of upland and tideland; (4) that, although "the lowering or raising by 1/10th of a foot may result in the gain or loss of acres, and there are only seven acres here involved" [R. 724], mean high tide line (a new and theoretical boundary criterion, unknown and unused in 1850 and 1880) should be now substituted by judicial *ipse dixit* in place of the natural boundary repeatedly defined by this court or the line of the neap tides which has become a rule of property in California,—thus raising the elevation of the boundary approximately 8/10ths foot after the lapse of fifty-five years from issuance of patent.

Respondent wholly failed to prove or even allege a cause of action. But this contention the Circuit Court refused to consider [R. 723].

COMPLAINT STATES NO CAUSE OF ACTION.

The complaint itself is fatally defective. It embodies the theory that "mean high tide line" is the boundary, [R. 8] whereas the law is well established that "ordinary high water mark,"—a physical, discernible mark, not a fictitious or theoretical plane,—is the legal boundary.

Moreover, any judicial approach toward acceptance of such theoretical boundary has resulted in the adoption of the line of the neap tides, not the mean of high tides.

LIMITS OF TIDE LAND GRANT TO RESPONDENT.

Respondent avowedly stands upon the legislative grant of May 1, 1911. (Cal. Stats. 1911, p. 1256, as amended by the Act of April 20, 1917, Cal. Stats. 1917, p. 159.) So far as here pertinent the latter act was but a re-enactment of the former, which granted to the City of Los Angeles all the state's interest

> "in and to all tidelands and submerged lands, whether *filled or unfilled*, within the present boundaries of said city, *and situated below the line of mean high tide* of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors in trust * * *."

An identical statute has been so construed by the Supreme Court of California (see page 116, *infra*) that any filled or unfilled tidelands lying above "mean high tide" on the date of the grant would not pass to the City of Los Angeles; but no attempt was made by respondent to prove the condition or elevation of the land as of 1911 and 1917, except to show that it had been "reclaimed" as an incident to improvement of navigation in 1909 [R. 389], so that at the time of the first grant it lay *above* the line of "mean high tide." Counsel, at the trial, said "The island was filled in 1909" [R. 320], and the plaintiff's witness Merwin:

> "* * * what I conceive to be the original surface of the soil had been covered to a depth of between four and six feet, making an overburden of that thickness which consists of dredged material, and the present elevation is several feet above mean high tide * * *" [R. 388-9]. [See also Fitzgerald, R. 381-2.]

ELEVATION OF MEAN HIGH TIDE LINE IS 4.7 FEET, NOT 5.1 FEET.

Respondent has again failed to make a case, according to its own theory, for the simple reason that it has adopted the 5.1 contour as the boundary line when the evidence unquestionably shows that the correct mean of the high tide, as established by the Coast and Geodetic Survey, is 4.7 feet above the datum plane from which the City measures. [Hughes, R. 342; Leypoldt, R. 401.]

The Coast and Geodetic Survey is recognized as an authority in all these matters [R. 342, 404-5] and it has definitely and authoritatively fixed the elevation 4.7 feet as the mean of the high tides at Los Angeles Harbor. [Hughes, R. 342; Leypoldt, R. 401.]

OTHER INSUFFICIENCIES OF PROOFS.

(a) The proof is equally silent as to the location of the line of the neap tides or the relation of that line to the disputed area. On the basis of 4.7 elevation for mean high tide the mean of the neaps would be at elevation 3.9 feet. (See pages 113, 116, *infra.*)

(b) Plaintiff's case proceeds entirely upon an attempted application of theoretical and technical engineering contours to the *locus in quo*. Its evidence rested wholly upon a datum plane of mean lower low water established in 1875, which, because of improvements made between 1871 and 1911 in the way of dredging, deepening and straightening the entrance channel and dredging and deepening the inner bay, so altered the tidal regime as to render wholly inapplicable to conditions in and after 1899 (the period of plaintiff's various measurements) the said datum plane of 1875. In other words, the evidence

showed indisputably that the deepening and straightening of the entrance and the dredging of the inner harbor so increased the tidal range as to lower the plane of mean lower low water *to an unknown extent* and that this resulted in *increasing pro tanto* each elevation thereafter taken and predicated upon the old datum plane of 1875, thus injecting into each of the city's measurements an error of unascertainable magnitude. See pages 117-131, *infra*.)

(c) It will also appear that, by reason of the inappropriate datum plane upon which respondent's oral evidence and maps and other documentary evidence are predicated, *and for other reasons discussed*, the plaintiff's case was wholly devoid of any substantial competent evidence which would warrant a finding that the demanded premises were at any time below the line of "mean high tide." The burden being upon plaintiff, it necessarily followed that the court had to make findings which negatived the allegation that the disputed area was tideland.

While the issues raised by the second to ninth counterclaims were not tried for the reasons stated by the court at R. 165, 185, the pleadings nevertheless contain certain controlling admissions.

Conceded Facts Show Estoppel of Respondent.

The second separate defense and counterclaim invokes the doctrine of estoppel, which the Circuit Court declined to consider [R. 723].

It is there alleged and admitted that on December 29, 1922, the City of Los Angeles purchased from Hancock Banning, at a price of $49,000 per acre, a tract of land in the central portion of the island consisting of 5.19 acres which adjoins on the south the lands of Borax

Consolidated, Ltd.; that the said parcel was conveyed to the said City by deed containing description according to official survey of W. H. Norway. [R. 52, 116.] It is further averred that the said description embraces more than two acres of land which, according to respondent's present contention, then lay below the line of ordinary high water. [R. 54.] The evasive denial of this latter allegation, found at R. 116, is insufficient to raise an issue. But the evidence precludes any doubt on this head [see R. 387 and 388]. The map of borings mentioned at R. 388, Exhibit 17, is not in the record, but it is reflected in the composite map, Exhibit 25, found at page 29 of Book of Exhibits. An examination of the same will disclose that most of the bore holes, which the witness said were on the parcel now leased to the Shell Oil Co., [R. 387] are outside of what the City now contends or concedes to be upland.

Said second counterclaim further avers that before buying its land, petitioner knew of the above mentioned purchase from Hancock Banning [R. 54]; this is admitted [R. 117], as are also the allegations, at R. 55 and 56, that plaintiff "was then and there actively engaged, directly through its Board of Harbor Commissioners and indirectly through the Chamber of Commerce of the City of Los Angeles, in a campaign to induce industries to locate at the Harbor of Los Angeles"; that no information or intimation as to its present claims was given by the City to petitioner prior to its purchase [R. 55, 117] and that it bought in the belief that all the land conveyed to it constituted upland and *"had no reason to believe that any portion thereof was tideland."* [R. 55, 117.] It is further alleged [R. 56], though equivocally denied at R. 118, that petitioner made extensive and expensive improvements upon the said land; the fact is shown by the

City's map [opposite R. 108], which reflects both the wharf and the building, as well as by Plaintiff's Exhibit 25 which shows on the Borax Company parcel a wharf, "a corrugated iron transit shed," the "engine house," and a "three story concrete building." Respondent's engineer Hale, at R. 632, conceded that the claims of the City include all the land covered by all of said improvements except a small portion of the said three story concrete building. It is also admitted that "the assessed valuations of the land, exclusive of improvements, have ranged from $116,100.00 to $141,100.00, which, according to well known practice of assessment of real property in City and County of Los Angeles, is but 50% of the assessor's actual valulation of the land." [R. 58, 119.]

Likewise it is admitted [R. 59, 119] that on March 28, 1928 respondent sought and acquired from petitioners an oil pipeline right of way across their premises "and over and across the premises which are described, or attempted to be described, in paragraph XII of the bill of complaint herein"; that this was at the City's solicitation and was granted without any consideration; that it was covered by a certain agreement found at R. 103-108, and that "said pipeline easement is therein described according to the lines of the said Norway survey;" that the pipeline was constructed and has been at all times since and *is now* being maintained and operated by the City under said agreement. Inspection of the agreement (wherein Pacific Coast Borax Co. is designated as "Company") discloses an express admission of petitioners' title:

> "Whereas, the Company *is the owner* of certain property at Los Angeles Harbor adjacent to Berths 165 and 166 which is being used for the manufacture and distribution of borax and similar products"; [R. 103.]

Again:

> "Whereas, the Company is ready and willing to permit the City to construct the necessary pipe-lines across *the property of the Company* for the purpose of connecting the storage tanks and pumps of the Shell Company of California with said municipal Berth 164 and to permit the transportation of such petroleum and products and compounds thereof as said oil company may desire to move through said pipelines;" [R. 104]

and:

> "The above described premises are shown on Map 4876 attached hereto and made a part hereof;" [R. 106]

and concludes as follows:

> "That upon the termination aforesaid of the permission hereby granted the City shall immediately quit and *surrender possession of said premises to the Company*, and shall at its own cost and expense remove the pipelines installed thereon." [R. 107.]

It will be observed by comparison of the attached map [R. 108] with Plaintiff's Exhibit 2 (Opposite page 12 hereof) that three out of five of the courses followed by said pipeline (at the lefthand corner of the page) follow exactly the boundaries of the property as described in the Norway survey and that the southerly line (top of page) extends 412 feet, of which at least three-fourths is now claimed by the City to be tideland.

It is further alleged and admitted that in September, 1928, the City, without payment of compensation, obtained an additional easement to install along said right of way a telephone conduit and cable, which were forthwith constructed and have at all times since been maintained and operated. [R. 60, 119.]

The authorities establish that these conceded facts create an estoppel against the City, even if it be conceded that the land was originally tideland.

Dismissal of Former Action a Retraxit.

The third defense and counterclaim counts upon a dismissal of a former action between the City and Banning, involving the same premises and the same issues, which dismissal was made pursuant to a compromise agreement and operated as a *retraxit*. But it received no consideration from the Circuit Court. [R. 723.]

The following allegations of that plea [R. 63-70] are admitted [R. 122-131]: That on October 19, 1908, an action (No. 64540) was brought by the Attorney General in the name of the State of California against the Bannings to have it adjudged that all of Mormon Island, with the exception of approximately three acres, was at all times tideland; that said action involved the premises described in paragraph XII of the instant complaint; that the tideland grant to the City of Los Angeles was made on May 1, 1911; that at all times subsequent to said date, the City of Los Angeles was the real party in interest in said action, conducted the same through its City Attorney and bore the expenses thereof until its dismissal in 1917; that the issues in the said cause were the same as in the case at bar; that no decision was rendered or judgment entered except the dismissal hereinafter mentioned; that concurrently with the said Mormon Island cause, a similar tideland action was prosecuted against the Bannings concerning Tideland Location 152; that that action resulted in a final judgment to the effect that the Banning Company owned the legal title to the land known as Tideland Location 152, subject, however,

to a public easement for navigation and fishery. Although there is an evasive denial at R. 126, the reply admits that on or about July 24, 1917, the City of Los Angeles and the Bannings made a written compromise agreement, wherein all disputes concerning the said Tideland Location 152 were compromised; it is alleged, but denied, that the disputes concerning Mormon Island were likewise compromised in the same agreement; it is admitted that pursuant to that agreement the Banning Company conveyed to the City all of its title to Tideland Location 152 and took back a tideland lease for a period of thirty years; that "it was expressly stated in the said agreement that the said cause No. 64540, involving said Mormon Island, was then pending in the said Superior Court and 'that the City shall and will, *concurrently with the execution of this agreement, enter the dismissal,* by the Attorney General of the State of California, of that certain action hereinabove referred to, now pending in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 64540 under the style of the People of the State of California, upon information of U. S. Webb, Attorney General, plaintiff, against the Banning Company, defendant, *relating to that parcel of land known as Mormon Island*'." [R. 66, 126.] And the argumentative denial at R. 126 is insufficient to place the following allegation in issue:

> "and it was further specifically stated and agreed in the said instrument that the grant of the said tideland location 152 by the Banning Company to the City of Los Angeles was made not only in consideration of the said thirty-year lease but *also in consideration of the other terms, conditions and covenants of the said agreement, which included the covenant for dismissal of the said action No. 64540.*" [R. 66.]

It is also admitted that the said agreement was authorized by ordinance of the City Council and that it had attached to it a map or plat prepared by the Harbor Department showing Tideland Location 152 adjoining Mormon Island on the North and East and delineating the island exactly in accordance with the Norway Survey; that the agreement was duly executed on July 24, 1917, and the Mormon Island action dismissed on August 6, 1917.

Petitioners rely upon the doctrine that a dismissal of an action made pursuant to a compromise agreement is the equivalent of a judgment upon the merits. Respondent sought to offset this by pleading [R. 124] a stipulation for dismissal without prejudice. But, under the authorities, the property rights of the Bannings under the agreement were vested on July 24, 1917, and thereafter their attorneys had no power to perform any acts in the case, or otherwise, which would divest or impair those property rights unless they had written authority so to do, and no such written authority is averred by respondent.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the Land Department has no jurisdiction "to determine the boundary line between the tideland belonging to the state and the upland belonging to the United States" and that "there was no attempt to exercise such jurisdiction".

2. The Circuit Court of Appeals erred in rejecting the authority of such cases as *Knight v. United Land Association,* 142 U. S. 161, and *Cragin v. Powell,* 128 U. S. 691, and in holding that the Federal patent is not conclusive evidence of the correct location of the boundary defined by ordinary high water mark.

3. The Circuit Court of Appeals erred in ruling that, as matter of law, the traverses of the Norway plat were not boundary lines and that the meander corners could be lawfully rejected.

4. The Circuit Court of Appeals erred in holding ordinary high water mark to be determined by the imaginary contour of mean high tide rather than the physical evidences wrought by the waters themselves (the test heretofore sanctioned by this court), or the line of the neap tides (as declared in the decisions of the California Supreme Court).

5. The Circuit Court of Appeals erred in holding that there is a substantial difference, in a quiet title (or ejectment) action, between a denial of plaintiff's title and a counterclaim or cross-action asserting defendants' title, and in holding that a judgment for defendant after trial of such issue can be reversed without an examination of the sufficiency of plaintiff's proofs.

6. The Circuit Court of Appeals erred in declining to hold that respondent failed to establish a case according to its own theory of law, and in refusing to examine this question.

7. The Circuit Court of Appeals erred in failing to hold that there was no substantial competent evidence opposed to the trial judge's finding that the demanded premises were at no time tideland, and in refusing to pass upon this question.

8. The Circuit Court of Appeals erred in failing to hold that the admissions of the pleadings establish facts which estop respondent from asserting the *locus in quo* to be tideland, and in refusing to pass upon this question.

9. The Circuit Court of Appeals erred in failing to hold that a dismissal of a former tideland action involving the *locus in quo,* made pursuant to a compromise, operated as a *retraxit,* and in declining to rule upon this problem.

Summary of Argument.

1. The Land Department is a special statutory tribunal, erected by competent authority, to which has been delegated exclusive jurisdiction to determine *facts,* such as boundaries, which are incidental to disposition of the public domain; in this respect its functions are judicial; its findings of such *facts* are conclusive—not subject to judicial re-examination. Errors of fact can be corrected only through proceedings for review within the Department. Such findings are binding upon Federal and State governments as well as individuals; public lands bordering on tideland are no exception to the rule; tideland titles are acquired by the states subject to the paramount Federal power to dispose of its public domain and to do all things incidental thereto, such as determining the location of the boundaries.

The cases of *Knight v. United Land Assn.,* 142 U. S. 161, and *Cragin v. Powell,* 128 U. S. 691, are not distinguishable in principle from the case at bar.

The *Knight* case held the "high water mark" of San Francisco bay to be conclusively established by the "meander line" of a Land Department survey which was made for the purpose of fixing the boundary between the Pueblo of San Francisco (a Mexican grant) and state tideland.

The attempted differentiation of the Circuit Court of Appeals rests upon misapprehensions of fact and of law. It said that the Department made no attempt to "determine the boundary line between the tideland belonging to the state and the upland belonging to the United States" [R. 721] and that it had no jurisdiction so to do because of an assumed absence of statutory authority [R. 721-2]. But the record shows indubitably that the Department industriously attempted to determine the location of ordinary high water mark of Mormon Island and thus assumed to exercise a jurisdiction to locate the boundary between upland and tideland. There was more specific statutory authority for a survey of tideland boundary at Mormon Island than there was with respect to Mexican land grants; but specific statutory authority was unnecessary; the *Knight* and *Cragin* cases establish this. The *Knight* case involved a "meander line" of a survey of "ordinary high water mark" and its ruling rested essentially upon the conclusive effect of the Land Department's determinations of fact concerning such boundary.

The case did not turn upon the effect of a Mexican grant; misapprehension in this respect accounts for the Circuit Court's major error. That phase of the Knight decision was devoted to a consideration of a secondary argument of appellant, namely, that the title of the State of California to tidelands would prevail over a prior Mexican grant,—which argument assumed as its premise an attempted grant of tideland by the Mexican Government; the confirmatory decree upon which the Knight survey was based carefully confined the grant to "ordinary high water mark." And the Land Department survey was not under the supervision of the court; it *followed* the confirmation decree, and was not subject to judicial review.

2. It is a *question of fact* whether "meander" lines are definite boundaries; the Circuit Court erroneously disposed of it as a matter of law. The record herein contains stipulations to the effect that the lines in question were boundary lines; this precludes a renewed and independent examination of that subject. Moreover, the circumstances of this island survey were such that the lines in question could be nothing but boundary lines; to hold otherwise is to deny any right of survey whatever.

But if these views be rejected, it remains true that a meander line is *prima facie* a correct location of the shore line; there is no warrant, in law or fact, for rejecting the corners; the competent evidence at bar was wholly insufficient to overthrow the trial judge's finding that these were boundary lines and correctly located.

3. Neither the Federal courts nor those of the State of California have adjudicated mean high tide line as the legal boundary. What constitutes the boundary is a Federal question; the law thereof was fixed at the time of the formation of our Government, the common law as developed up to that time becoming our governing principle. The federal decisions uniformly hold "ordinary high water mark" to be the boundary line and recognize a physical mark on the ground as being the determining feature; no distinction is drawn between rivers and tide waters in this respect. The practice of the Land Department, which Norway followed, was to locate this "actual mark as it appeared on the land," and this contemporaneous construction of the law is not to be rejected except for cogent reasons, which do not here exist.

The case of *Attorney General v. Chambers*, 4 De G. M. & G. 206, decided in 1854, is neither controlling nor persuasive, for the common law as developed in the United States, and particularly in California, clearly establishes the line of the neap tides as the true criterion of the location of "ordinary high water mark." And this was no departure from the old common-law rule. Authorities cited in the *Teschemacher* case, 18 Cal. 11, 21, clearly establish this. The *Chambers* case is the one which marks a departure from settled principle.

The line of the neaps has become a California rule of property to which *stare decisis* applies and from which Federal courts cannot depart, even though now disposed to the view that the rule is not an ideal one or the best which could have been originally devised. There is no substantial evidence disclosing the comparative elevations of the demanded premises and the line of the neap tides.

The boundary of Mormon Island was fixed at the time of the admission of the state and it is not just to apply, eighty-five years after the event and fifty-five years after the patent, a boundary test such as the imaginary mean high tide line, when that test could not possibly have been applied to the land at the times in question.

4. The court's finding that the plaintiff had not proved the allegation of tideland status of the demanded premises is conclusive and of itself constitutes an estoppel between the parties. Defendant's counterclaim added nothing to its denials, which put in issue the plaintiff's title. Defendant's counterclaim could have been dismissed or ignored

without materially affecting the issues. It therefore makes no difference whether defendant was granted affirmative relief or not, for the adjudication upon plaintiff's title necessarily ends the litigation. Under these circumstances it was error for the Circuit Court to overthrow the finding and award plaintiff a new trial without examining into the sufficiency of the evidence upon which plaintiff relies, both the competency and weight thereof.

5. Examination of the record discloses that respondent failed to make a case according to its own theory, for (a) it stood upon a mean high tide line elevation of 5.1 feet and actually proved that elevation to be 4.7 feet, but did not locate the 4.7 contour upon the land; (b) it affirmatively proved that its tideland grant was limited to filled and unfilled tide lands which lay below the elevation of the mean high tide at the date of grant and that the demanded premises had been previously filled to an elevation above that of mean high tide; (c) respondent's evidence affirmatively disclosed that all of its elevations were erroneous because predicated upon a datum plane established in 1875, which had ceased to be applicable because of changes in the tidal regime due to harbor improvements, the extent of the error being undetermined and unascertainable.

6. The court found as a fact that the *locus in quo* had never been tideland. The judge's reasoning is immaterial if the facts support the finding, and he is presumed to have disregarded all incompetent evidence in

arriving at that finding, which will not be overthrown upon appeal unless clearly erroneous. There is no substantial competent evidence which is inconsistent with that finding.

7. The admissions of the pleadings establish facts which estop respondent from asserting the disputed area to be tideland. Federal authorities, as well as those of the State of California, establish that such estoppel will, under proper circumstances, run against a municipality with respect to property held in trust for the public.

8. Like admissions show that a former tideland action between the same parties or their predecessors in interest, involving the same premises and the same issues, was dismissed pursuant to a compromise and under circumstances which operated as a *retraxit*.

POINT I.

Issuance of the Government Patent Conveying Mormon Island Was a Conclusive Adjudication of All Supporting Facts, Such as Character and Boundaries of Land Described Therein, and Same Is Not Subject to Review for Error of Fact in Any Court.

(Specifications of Error Nos. 1 and 2.)

Mormon Island was concededly public land when California was admitted to the Union; the Land Department had jurisdiction to dispose of it as such; its legal boundary was ordinary high water mark and it was necessarily a question of fact where that line lay; as an incident to selling the land, the Department had jurisdiction to inquire into and determine its character, quality, area and boundaries, and any mistake made therein would constitute error and nothing more; as no one knew the location of ordinary high water mark, the legal boundary between upland and tideland, it was incumbent upon the Land Department to determine and delineate the same as a matter of fact, and its action thereon, in the absence of appeal to the Secretary, was conclusive, as upon any other fact.

Vice of Respondent's Assuming Premises to Be Tideland.

Respondent's arguments and citations of authorities throughout this litigation have been misplaced, because they continuously *assume* that the demanded premises were above ordinary high water mark, whereas that was the whole question in the trial court and was the main question of fact which the Land Department had to determine as a predicate for its patent. Such arguments beg the whole question in the case; they run around a circle which necessarily brings the conclusion back to the premise.

The cause cannot properly be determined upon the *assumption* that plaintiff's allegations are true; this circular form of argument is responsible for the error into which the Circuit Court of Appeals has fallen. Its opinion shows that every contention of petitioners was tested by this tacit assumption that the lands, found by the trial court never to have been tideland, were in fact of that character bocausé so asserted by the plaintiff. It was this type of argument which the Supreme Court of California followed in the *Knight* case; the fallacy of it was clearly demonstrated by Mr. Justice Field in 142 U. S. 205-6:

> "From the opinions upon both affirmances it appears that the court below, equally with the referee, lost sight of the principle that in actions at law a patent of the United States, upon a confirmation of a private land claim asserted by virtue of rights acquired under a foreign government, is not open to collateral attack, but must be taken as correct until vacated, *not only as to the validity of the claim confirmed, but as to the boundaries established. It is hardly necessary to say that any attempt to overthrow these conclusions in either particular, where the tribunal affirming the validity of the claim and the department establishing the boundaries had jurisdiction, is collaterally attacking the patent.*
>
> * * * * * * * * *
>
> "The court below upon the first affirmance rejected the boundary as established and surveyed by the officers appointed by law for that purpose, and assumed that the line of ordinary high-water mark of Mission

Creek running into the bay was, as far as such line extended, the true boundary designated by the decree, and held that land below such line was the property of the state. In other words, it assumed that the boundary of the pueblo was to follow the line of high-water mark of the creek, and not be confined to the high-water mark of the bay. *It thereupon stated that the question involved was whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of confirmation.*

"In this statement the learned court fell into an error. No such question was involved in the case. The approved survey upon which the patent was issued crossed the mouth of Mission Creek and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiffs could *collaterally assail the correctness of the official survey upon which the patent was issued and establish another line as the true boundary,* and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any court. *If there was error in the survey embodied in the patent it could not have been shown in this action. It could only have been corrected by direct proceedings for that purpose instituted by the government or by its authority. This is elementary law, and in vain will authorities be sought to contradict this view."*

At page 211:

"The court below having assumed that another line than the one officially established was the true one, *took the extraordinary ground that the error committed in that respect by the surveying officers, though acting under the express directions of the Land Department, was jurisdictional and fatal to their action,* rendering it void, and opening the patent embodying the survey to collateral attack. And it proceeded to cite several decisions in supposed support of this view, *but which only were to the effect that where the Land Department had no jurisdiction over the subject-matter considered its patent could be assailed collaterally.*

"In thus holding, the *court failed to distinguish between what was upon its own statement mere error in the action of the Land Department and matters which were entirely beyond its jurisdiction.* The ascertainment of the true line of the boundaries of the claim confirmed was a matter especially entrusted to that department by the laws of Congress, as already stated. *If the officers* of that department in executing the survey *made mistakes,* ran erroneous lines, and included lands which they should have excluded, *those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void.* If all that is asserted be true *they only erred in the exercise of their jurisdiction,* and the *remedy for their errors before the issue of the patent lay in an appeal* to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the Secretary of the Interior; and if after the issue of the patent like objections were urged, the remedy could be sought *only by direct proceedings.*"

Land Department a Special Tribunal With Judicial Powers.

Mormon Island, whatever its extent, belonged to the Federal Government as part of its public domain and was subject to entry and sale. The state, upon its admission to the Union, automatically succeeded to the surrounding foreshore. The United States had already erected its own statutory tribunal, the Land Department, for the administration of its public lands, which as soverign it might alienate in its own way and upon its own terms. Necessarily incident thereto was the determination of the *facts* concerning the character, quality area and boundaries of such public land. It had committed to this special tribunal exclusive jurisdiction over these matters in such manner that its decisions had been held conclusive,—not subject to review in any other tribunal,—as to facts so committed to it. This had been done prior to 1850.

Section 453, Rev. St., which is the primary source of such power in the Land Department (see *Cragin v. Powell, infra*), was passed as early as 1812 pursuant to Art. IV, Sec. 3 of the Constitution, which provides:

> "* * * the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *."

Such jurisdiction is one which the Land Department "has exercised since its organization, and which has been always recognized by the courts of the United States" (quoting Mr. Justice Field in *Knight v. United Land Assn.*, p. 200). "From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior." (*Cragin v. Powell, infra*.)

That the decision of the Land Department, acting as such special statutory tribunal and within its jurisdiction, is *conclusive* upon all *questions of fact*, and binds the courts as well as litigants, is established by such cases as

Knight v. United Land Association, 142 U. S. 161;

Cragin v. Powell, 128 U. S. 691;

Heath v. Wallace, 138 U. S. 573;

Russell v. Maxwell Land Grant Co., 158 U. S. 253;

United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316;

West v. Standard Oil Co., 278 U. S. 200;

Jameson v. James, 155 Cal. 275, 278.

Boundary a Question of Fact.

The foregoing authorities have full application to questions of boundary between Federal and state lands; this is established by *Cragin v. Powell*, 128 U. S. 691. This case presents our specific question—the conclusiveness of a Land Department survey of a parcel of public domain with particular reference to the boundary line of adjoining land which had passed to the state; the question being the same whether the boundary be that of swamp land or of tideland, as we shall later show.

The *Cragin* action, brought by Powell and others against Cragin in the Louisiana state court, was "an action of boundary," the object of which under the Code of that state "is to determine and fix the boundary between contiguous estates of the respective proprietors." After removal to the Federal Court the action was converted into an equity case. Appellant Cragin claimed under a United States patent issued to one Bach "according to the official plat of the survey of said lands returned to

the General Land Office of the United States by the surveyor-general." Powell and associates claimed under a patent from the state of Louisiana to one Wolf. The state's title or claim of title was derived from a Federal swamp land grant under the Act of March 20, 1849.

On motion of Powell *the court* "appointed a surveyor, for the purpose of ascertaining and fixing the boundary lines between the properties of the respective parties litigant," one McLeran being selected for that purpose. In due season he filed his report to the effect that the sections in which the disputed lands were situated were officially surveyed in 1837 by one Connelly, as part of the public domain, and that the plat of such survey was filed in the United States Land Office:

> "* * * that he considered this survey of Connelly so incorrect, and the traces of its lines and corners so difficult to identify, that he was unable to locate any proper line between the lands in question, except upon the basis of a resurvey of the entire township. * * * McLeran proceeded to run a line which he considered the proper boundary between the lands in question. * * * In his supplemental report McLeran says 'It appears that Bayou Four Points was erroneously reported by the original survey.' * * *
>
> "The line recommended by McLeran places the lands of the appellees where those of the appellant are located by the official survey, and thus gives to the former the rich ridges along the bayous now in the possession of the latter." (pages 693-4.)

The court said in part at page 697:

> "The surveyor, McLeran, insists not only in his original report of his survey, but also in his second explanatory report, and in his oral evidence, that

this governmental survey is incorrect; some of it more incorrect than the rest, but especially erroneous in the length of its lines and in the location of Bayou Four Points on the portions of the sections patented to the appellees. The plat, he reports, is totally inconsistent with that of the governmental survey, and should have been rejected by the court below.

"*Whether the official survey made by Connelly is erroneous,* or should give way to the extent of its discrepancies to the survey reported by McLeran, is a question which was *not within the province of the court below, nor is it the province of this court to consider and determine.* The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the government. *The correction of these mistakes and abuses has not been delegated to the judiciary,* except as provided by the Act of June 14, 1860, 12 Stat. at L. 33, in relation to Mexican land claims, which was repealed in 1864, 13 Stat. at L. 332. *From the earliest days* matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. R. S. Sec. 453. The commissioner, in the exercise of his superintendence over Surveyors-General, and of all subordinate officers of his bureau, is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud in their operations. R. S. Sec. 2478; *Bell v. Hearne,* 60 U. S. 19 How. 252 and 262. Under the authority of specific appropriations by Congress, for that purpose, the resurveys of public lands have become an extensive branch of the business of the General Land Office. * * *

"That *the power to make and correct surveys of the public lands belongs to the political department of the government,* and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, *like that of other special tribunals* upon matters within their exclusive jurisdiction, *are unassailable by the courts,* except by a direct proceeding; *and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient.*"

The court further said, page 699:

"The reason of this rule, as stated by Justice Catron in the case of *Haydel v. Dufresne,* is 'that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do.'"

R. S., sec. 2395, par. 7, to which reference is made in the decision, is now 43 U. S. C. A., sec. 751, par. 7; R. S., sec. 2396, par. 2, is now 43 U. S. C. A., sec. 752, par. 2; R. S. sec. 453, is now 43 U. S. C. A., sec. 2; R. S., sec. 2478, is now 43 U. S. C. A., sec. 1201

No Distinction in This Regard Between Swamp Land and Tideland.

The fact that the *Cragin* case dealt with swamp land, title to which was acquired under Congressional grant, presents no point of legal differentiation. It has been quite uniformly recognized that, for present purposes at least, there is no difference in the nature of the State's

title to swamp and overflowed lands acquired under a statutory grant and to tidelands acquired under the statute of admission. The Supreme Court of California said in *Ward v. Mulford*, 32 Cal. 372:

> "In private proprietorship and in soverign right the United States succeeded the Mexican government, and in both these respects California, so far as she acquired any right in either, succeeded the United States and became privy to the latter in estate in respect to all lands within her borders, whether such as may be held in private or soverign right. In this respect no distinction can be made between the lands acquired by her through federal grants and such as she took by virtue of her sovereignty."

This language was quoted with approval by Mr. Justice Field in the *Knight* case, at page 202. Judge Cosgrave came to the same conclusion [R. 162-3].

Necessarily the boundary question here under consideration is the same whether we deal with swamp and overflowed lands, on the one hand, or tidelands, on the other, for the former class, so far as concerns the seashore, are those which, though situated above the ordinary high-water mark (*People v. Morrill*, 26 Cal. 336, 356), are so saturated from periodic overflow as to be not susceptible of cultivation without reclamation through drainage or otherwise. (See *Irwin v. San Francisco Savings Union*, 28 Fed. 708, 712 per Field, J., (affirmed in 136 U. S. 578) and *Miller v. Tobin*, 18 Fed. 609, 614.) Those lands lie immediately above high-water mark, while tidelands lie just on the other side of the same line. The question involved in each case is the character of the land and whether above or below the ordinary high-water mark. It is held to be a question of fact in each instance, though

the swamp land cases are more numerous than those involving tidelands.

See
Heath v. Wallace, 138 U. S. 573, 585;
Foss v. Johnstone, 158 Cal. 119, 133, 136;
Muck v. Weyerhaeuser Timber Co., 273 Fed. 469, 471-2 (9 C. C. A.).

Only Questions of Fact Involved in Norway Survey.

Applying these decisions to the situation at bar, we find that there was no question of law involved and, indeed, respondent claims no error of law in any of the proceedings leading up to the government patent. Nor is there any claim of fraud. As we shall later show, high-water mark, a physical mark impressed upon the land by the action of the bay, was the recognized boundary. Norway was instructed to locate and delineate that mark, and this he did in the manner sanctioned by existing Land Department custom. [R. 333]. This entailed the determination of two specific questions of fact—one by Norway as to the actual location of the high-water mark, and the other by the General Land Office as to the correctness of the depiction of the Norway field notes upon the plat which was incorporated by reference into the patent. If these factual matters are to be now reviewed after the lapse of some fifty-five years, all the regrettable consequences would follow which are suggested in *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, 258;

> "There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. None other is

named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government was open to question, interminable confusion would ensue. Take the particular case at bar; if the survey is not conclusive in favor of the plaintiff, it is not conclusive against it. So we might have the land grant company bringing suit against parties all along its borders, claiming that, the survey being inaccurate, it was entitled to a portion of their lands, and as in every case the question of fact would rest upon the testimony therein presented, we should doubtless have a series of contradictory verdicts; and out of those verdicts, and the judgments based thereon, a multitude of claims against the United States for return of money erroneously paid for land not obtained, or for a readjustment of boundaries so as to secure to the patentees in some other way the amounts of land they had purchased."

DEPARTMENT DECISIONS REVIEWABLE ONLY ON LAW QUESTIONS.

United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316; *West v. Standard Oil Co.*, 278 U. S. 200, and *Jameson v. James*, 155 Cal. 275, 278, are typical of a long line of decisions which hold the Land Department to be *"a special tribunal with judicial functions"* whose rulings are reviewable only on law questions, and whose findings of fact are *conclusive*.

WHEN JUDICIAL QUESTION ARISES IN BOUNDARY CASES.

Specific application to boundary questions of the above rules is found in *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, where the relation between the Land Department and the courts, in boundary matters, is also clearly

defined. That was an action in ejectment, plaintiff claiming under a Federal patent issued pursuant to the "Maxwell Land Grant" in New Mexico. Defendants claimed under the Federal homestead laws. An official survey of the Maxwell Land Grant had been made for the purpose of establishing the boundaries of the same. "The land in controversy is within the limits of the survey, and thus within the terms of the patent," which granted the "tract of land embraced and described in the foregoing survey." Upon the trial the defendants offered to prove that "the survey described in and upon which the patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Land Grant so as to exclude therefrom the tract in controversy." In upholding the rejection of such evidence, this court adverted to the fact that "a survey does not create title; it only defines boundaries" (p. 259); quoted from the *Cragin* case to the effect that the subject is one committed exclusively to the Land Department; stressed the language of *Beard v. Federy*, 3 Wall. 478 as to the insufferable consequences which would follow from any other rule, and held:

> "These authorities are decisive upon this question. And in the nature of things a survey made by the government must be held conclusive against any collateral attack in controversies between individuals."

Concerning the points upon which respondent here relies, (a) the claim that fixing of a boundary involves the conveyance of land, and (b) the assertion that boundary location is a judicial question, the court said, at page 259:

> *"A survey does not create title; it only defines boundaries.* Conceding the accuracy of a survey is not an admission of title. So the boundaries of the tract claimed by defendants may not be open to dis-

pute, but their title depends on the question whether the United States owned the land when their ancestor filed his homestead claim thereon. If at that time the government had no title, it could convey none.

"In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of courts over boundaries. *Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction* otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and *whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts.* In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the *offer was simply to show that that survey was inaccurate,* and that the lines should have been run elsewhere, but *this is not a matter for inquiry in this collateral way in the courts.*"

To same effect are:

U. S. v. Montana etc. Co., 196 U. S. 573, 577-8;

Weaver v. Howatt, 171 Cal. 302, 305.

In this connection see, also, *Muchenberger v. City of Santa Monica,* 206 Cal. 635, wherein it was held that an agreement fixing a definite and fixed boundary between tideland and upland does not constitute a conveyance in violation of the tideland trust.

California Acquired Title Subject to Exercise of Land Department Jurisdiction.

When the state was admitted into the Union it took its title to public lands and, indeed, statehood itself subject to the future exercise of all paramount Federal powers, including "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (*Const.*, Art. IV, Sec. 3.)

Solicitous that there be no infringement upon the Federal jurisdiction in the premises and no disputes such as the instant one, Congress inserted in the Admission Act a clear compact "that the people of said state, through their Legislature *or otherwise*, shall never *interfere with* the primary disposal of the public lands within its limits, and shall pass no law and *do no act whereby the title* of the United States to, and *right to dispose* of, the same shall be *impaired or questioned.*" (Act of Sept. 9, 1850; 9 Stats. 452.)

The terms of the admission compact comprised an express reservation, on the one hand, and recognition, on the other, of the continuance of this existing paramount power. (*Gibson v. Chouteau*, 13 Wall. 92; *Irvine v. Marshall*, 20 How. 558.)

The *Knight* and *Cragin* cases, *supra*, specifically hold Land Department boundary decisions to be conclusive, as does *People v. San Francisco*, 75 Cal. 394. In the *Knight* and *San Francisco* cases the controversy involved a clash between Federal and state rights concerning tideland boundary; the State of California was itself the plaintiff in the *San Francisco* case.

THE CIRCUIT COURT OF APPEALS ERRED IN REJECTING THE AUTHORITY OF SUCH CASES AS KNIGHT v. UNITED LAND ASSOCIATION AND CRAGIN v. POWELL AND IN HOLDING THAT THE FEDERAL PATENT IS NOT CONCLUSIVE EVIDENCE OF THE CORRECT LOCATION OF THE BOUNDARY DEFINED BY ORDINARY HIGH WATER MARK.

The *Knight* case, 142 U. S. 161, decides our specific problem—whether the Land Department determination of boundary between upland and tideland is conclusively binding upon the state and those holding under it. The decision actually supports these propositions: (a) That the delimitation of boundary between upland and tideland presents a question of fact whose determination is committed to the Land Department as a special statutory tribunal exercising judicial functions in the premises; (b) that its jurisdiction is exclusive of the courts of the United States or of any state; (c) that complaint of error in the survey or in any other factual decision entering into issuance of patent must be pursued through appeal to the Commissioner of the General Land Office and from him to the Secretary of the Interior—not through any of the courts; (d) that such remedy is the only one available to one of the states or its grantees, just as in case of a private person; (e) that the survey and patenting of land conceded to be public domain furnishes a "subject matter" with respect to which general jurisdiction vests in the Land Department, and any errors committed in deciding any matters of fact entering into such survey or patent—such as the exact location of the boundary line or the proper interpretation of surveyor's field notes—constitutes merely an error in the exercise of jurisdiction, not an ouster of the

same; (f) that this rule is fully applicable to boundary between upland and tideland as to any other boundary of public land; and (g) that cases such as those heretofore cited by respondent present instances of *want* of jurisdiction, not *error in its exercise,* and are clearly distinguishable on that ground.

Mr. Justice Lamar, formerly Secretary of the Interior, delivered the main opinion, he being also the author of the opinions in the *Cragin* and *Heath* cases, *supra.* This was an action of ejectment, brought by United Land Association and another, plaintiffs asserting "that the premises were below the line of *ordinary highwater mark* at the date of the conquest of California from Mexico and therefore upon the admission of the state into the Union, in 1850, inured to it *by virtue of its sovereignty over tidelands;* and the defendant insisting that the lands are a portion of the pueblo of San Francisco, as confirmed and *patented by the United States.*" Plaintiffs claimed under grant from the State Tideland Commissioners of the State of California. Defendants claimed under the pueblo claim of the city of San Francisco and the Federal patent in confirmation of same.

After the passage of the Act of March 3, 1851, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California" (9 Stats. 631), the city of San Francisco, as the successor of the Mexican pueblo by that name, presented its claim to the Board of Land Commissioners created by said act and sought confirmation. It claimed and the board confirmed to it four square leagues. The matter subsequently came before the United States Circuit Court, which entered its confirmatory decree on May 18, 1865, the language of which was as follows:

"The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above *ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and *east by the bay of San Francisco;* on the west by the *Pacific ocean;* and on the south by a due east and west line drawn so as to include the area aforesaid." (p. 169.)

Appeals were taken from the decree, but later dismissed.

"The measure of the city's title to the four square leagues of land is to be found in the decree of confirmation and the act of Congress just recited. *The question of the city's title having been settled, it became necessary to fix the boundaries of its lands by a survey. This duty, under the law, devolved upon the political department* of the general government having charge of the public lands." (p. 170.)

Accordingly one Stratton, as deputy surveyor, made a survey in 1867 and 1868 which, after much delay, was confirmed by the Commissioner of the General Land Office, but ultimately rejected by the Secretary of the Interior. Stratton ran his lines along the ordinary highwater mark of the bay of San Francisco until he came to Mission Creek, and he then followed the tide line up the creek and, crossing over, ran down the other side. The Secretary of the Interior rejected his survey and plat and ordered a resurvey, which was made by one Von Leicht. That survey crossed over the mouth of Mission Creek, and patent was issued to the city of San Francisco based thereon.

As we have said, the plaintiffs in the action claimed under a state tideland grant; and they were permitted to introduce oral evidence to show that the premises were below the ordinary high-water mark; this upon the theory that the Stratton survey was correct and that of Von Leicht incorrect, and that the lands in question were actually situated below the ordinary high-water mark. As at bar, the plaintiffs did not seek to show that the land in question was situated outside the boundary line of the survey, for it was conceded that it was within those lines; but it was claimed, as here, that the survey was incorrect; that the lines were incorrectly drawn; and that what had been determined as a matter of fact to be above ordinary high-water mark was actually below it.

The contentions of plaintiff are stated at pages 166-7 of the report. They were essentially those urged by respondent at bar.

The referee found, among other things, that:

> "(5) The description of the premises contained in the patent being in excess of the premises described in the prior survey and in the decree, the patent, to the extent that it covered land of the state not confirmed to the claimant, was invalid, and did not operate to convey the state's title to the premises in controversy." (p. 167.)

The court said, in part (p. 176):

> "The case as presented by this record involves some very interesting questions. Ever since the decision in *Polk v. Wendal*, 13 U. S. 9 Cranch. 87 (3:665), it has been the settled law of this court that *a patent is void at law if the grantor state had no title to the premises embraced in it*, or if the officer who issued

the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law.

* * * * * * * * *

"It is sought by the plaintiffs to bring this case within that rule; and it is, therefore, strenuously insisted that the patent for the San Francisco pueblo is *void to the extent that it embraces lands below ordinary high-water* mark of Mission Creek as that line existed at the date of the conquest of Mexico in 1846.

"In order to sustain this proposition the claim is put forth that the Stratton survey was correct, and was never legally set aside; that the Von Leicht survey, upon which the patent was issued, was wholly unauthorized in law and void; and that the premises in dispute being excluded by the Stratton survey, and being proved by parol evidence to have been below the line of ordinary high-water mark, were never legally included in the patent, and were not included in the decree of confirmation.

"It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. *Cragin v. Powell,* 128 U. S. 691, 699 (32:566, 568), and cases cited. Under this rule it *must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant, as established by the confirmatory decree, is binding in this court, if the department had jurisdiction and power to order that survey.* It is claimed, however, and the referee so determined, that no such

power or authority existed in the department, because it had been exhausted by the action of the Commissioner of the General Land Office in approving and confirming the Stratton survey in 1878. * * *"

At page 182:

"We conclude, on this branch of the case, that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht; and that his action in such matter is unassailable in the courts in a collateral proceeding. *The Von Leicht survey, therefore, must be held as a correct survey of the pueblo claim as confirmed by the Circuit Court.*"

In holding that parol evidence was not admissible to establish the line of ordinary high water, the court said, at page 184:

"We think it clearly follows that the *patent* of the government is evidence of the title of the city under Mexican laws, and is *conclusive*, not only *as against the government* and against all parties claiming under it by titles subsequently acquired, but *also as against all parties except* those who have a *full and complete title acquired from Mexico anterior in date to that confirmed* by the decree of confirmation. This conclusion is fully sustained by the decisions of this court,"

and quoted at pages 187-89 from *Beard v. Federy*, 3 Wall. 478, as follows:

" 'The obligation to which the United States thus succeeded was, of course, *political* in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the Act of March 3, 1851, they have * * * *designated officers*

to survey and measure off the land when the validity of the claims is finally determined. When informed by the action of its tribunal and officers, that a claim asserted is valid, and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and *is correctly located now, so as to embrace the premises as they are surveyed and described.* As against the government, this record, so long as it remains unvacated, is conclusive. *And it is equally conclusive against parties claiming under the government by title subsequent.* It is in this effect of the patent as a record of the government that its security and protection chiefly lie. *If parties asserting interests in lands acquired since the acquisition of the country* could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. *The patentee would find his title recognized in one suit and rejected in another,* and if his title were maintained, he would *find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest.* Every fact upon which the decree and patent rests would be open to contestation. The intruder, resting

solely upon his possession, might insist that the original claim was invalid; *or was not properly located,** and, therefore, he could not be disturbed by the patentee."

Rejected Reasoning of California Supreme Court.

The force of this decision is made more manifest by a consideration of the opinion of the California Supreme Court in 85 Cal. 448, which was reversed by this court. The position taken by the California court is that which plaintiff assumes at bar. At 85 Cal. 462 it is said:

"Again, the land in dispute was not land which the government had the power to grant at the date of the filing of the petition for confirmation. Not having been granted by the Mexican government before the conquest, it remained the property of the sovereign. The petition for confirmation was not filed until long after the admission of California into the Union. Immediately upon such admission, the state, by virtue of her sovereignty, became seised of the land, the same being tideland of the bay of San Francisco. The land did not, therefore, belong to the United States, and even Congress had no power to grant it to another. *Quoad* this land, the patent is absolutely void, for the reason given in *Polk's Lessee v. Wendal*, 9 Cranch. 87, cited on behalf of the appellant; the government in whose behalf the patent issued had no title to the thing granted."

At page 469:

"There being no grant to which the rights of the state were subordinate, and to the settlement of which the rights of the state were postponed, she became vested with the title immediately upon her admission

*Italics by the Court.

into the Union. Thereafter there was no power in the government of the United States to make a grant of the land, and the act of its ministerial officers in including it within the survey and patent of a grant theretofore made was in excess of their jurisdiction, in violation of the decree of confirmation, and void. The patent, so far as these lands were concerned, was, in effect, but the execution of the decree of confirmation."

The Field Concurring Opinion.

Mr. Justice Field, in an elaborate opinion concurring in the reversal of the state court decision, pointed out more clearly than had the author of the main opinion the real philosophy of the ruling. First he defined "collateral attack." See quotation at page 33, *supra.*

Concerning the distinction between lack of jurisdiction and error in its exercise he used the language already quoted at pages 33-35, *supra.*

And he thus disposed of the *Doolan* and similar cases on which respondent here relies (p. 212):

"The cases referred to and dwelt upon as supposed to support the opposite doctrine are not susceptible to the meaning attributed to them. The principal cases cited are St. Louis Smelt. & Ref. Co. v. Kemp, 104 U. S. 641 (26:876); Wright v. Roseberry, 121 U. S. 488 (30:1039), and Doolan v. Carr, 125 U. S. 618 (31:844). They assert no new doctrine, but law which has always existed and been recognized, though seldom more misapplied than here. That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued, is a self-evident proposition.

"The attempt is futile to use these cases, or any other case to establish the proposition that if an error can be shown in the action of an officer of the Land Department in a matter subject to its jurisdiction the proceeding of the officer may be treated as a nullity and the patent issued thereon be collaterally assailed.

"This view is untenable, and does not merit serious consideration. If it could be sustained it would be *subversive of all security in the judgments of ordinary tribunals, as well as in those of special tribunals, like the Land Department.* * * *

"The reasons given by the court below on the second affirmance of the judgment of the referee are marked by the objections stated to its former opinion. The true doctrine as to the effect of patents in actions at law is stated in a decision of the court below in *DeGuyer v. Banning*—rendered whilst this case has been pending here, in which that court, *following a long line of previous adjudications, unbroken except by this case,* declares that upon a confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant, and that if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control. It is the only doctrine which will insure peace and tranquillity to parties holding under patents issued upon confirmed Mexican grants. *Any other doctrine would introduce endless confusion and perplexity as to all such titles.* If there be, in fact, any material conflict between the boundaries given in the decree of confirmation and those described in the official survey, the only remedy is to be sought by *direct proceedings instituted by the government, or by its authority.* Until the alleged conflict is thus determined and adjusted, the patent must control."

All the contentions of plaintiff in the *Knight* case rested upon the *assumption* that the demanded premises constituted tideland notwithstanding the finding of the Land Department to the contrary. The arguments are essentially those made by the respondent herein, adopted by the Supreme Court of California in its *Knight* opinion, and necessarily rejected by the decision of Mr. Justice Lamar. Though not discussed *seriatim* or in detail, *their rejection is the inescapable conclusion from a study of the opinion.*

Incidental Fact of Judicial Confirmation of Mexican Grant.

The factual difference between the *Knight* case and the situation at bar is legally inconsequential. We refer to the circumstance that the defendant's title in that instance had originated with the Mexican Government and that the Federal patent was confirmatory. It will be seen from an examination of both opinions that, although the antecedent nature of the pueblo title was adverted to, it was not treated as of controlling importance. The philosophy of the decision and of the concurring opinion is that of the *Cragin* case, namely, that the Federal Government, in the exercise of its sovereign power, has created a special tribunal to which has been committed exclusive jurisdiction over determination of boundaries of public lands, and that any state title acquired from the Federal Government, whether swamp land or tideland, is taken subject to the paramount authority of the Federal Government in the premises.

Moreover, a careful scrutiny of the decision will show that the rights of the Federal Government as proprietor (as well as its sovereign right to protect, confirm and

effectuate the prior Mexican grant) were involved. Speaking of the review of the Stratton survey by the Secretary of the Interior, Mr. Justice Field adverted to this matter, saying:

> "Mr. Schurz was then at the head of the Interior Department, and he examined at great length the action of the commissioner and of the surveyor-general upon the survey; received a large amount of testimony upon the objections presented, and heard arguments of counsel thereon. And he held that the treatment of the survey by the commissioner proceeded on the assumption that the United States had no interest in the matter, and that if the state and city were satisfied, the duty of the department was to approve the survey. This the Secretary held to be a grave error, observing that if the excluded tracts which the city claimed under the protest were above high-water mark in 1846, they ought to be included in the survey, and then the southern boundary line would have to be moved further north, *excluding a corresponding quantity which would fall into the public lands of the United States.* No stipulation or agreement, therefore, said the Secretary, between the state and the city and county could estop or relieve the officers of the department from the duty of executing the decree or of protecting the interests of the government, adding, that if the city and county should ask to withdraw the protest or to have the same dismissed the government would still have the right to make use of the objections, and of the evidence filed in their support for its own protection as well as for properly surveying the claim in accordance with the decree. He therefore discarded entirely the ground which the Commissioner had advanced as the principal reason for approving the survey." (P. 192.)

It seems manifest, moreover, that the Federal Government would have no greater right to invade state tideland title in confirming a Mexican grant expressly "bounded on the north and east by the Bay of San Francisco" than it would have to do the same thing in support of a like grant of land not previously affected by any Mexican title. Not everything is tideland that is claimed to be such. Essentially the decision holds that the state's title to its tidelands is subject to the paramount power of delimitation of public lands which has always resided in the Federal Government.

CIRCUIT COURT'S INTERPRETATION OF THE KNIGHT CASE.

The Circuit Court of Appeals conceded [R. 720] that the line established in the *Knight* case was conclusive even though erroneous and even though existing tideland was actually included within the lines of the survey. And the line there under consideration was indubitably a "meander" line. But the court held jurisdiction to be lacking, with respect to the Norway survey, for two stated reasons: (a) that the *Knight* case dealt with a grant made by Mexico prior to acquisition of the state's tideland rights and that such Mexican grant might lawfully include tideland; and (b) that the determination of the boundary lines of the pueblo grant involved in the *Knight* case was made by the Land Department under specific statutory authority and command. It was further said that neither of these conditions exists at bar.

Fact of Mexican Grant Not Determinative of Knight Case.

The first ground of differentiation overlooks the true *rationale* of the *Knight* decision. It may be conceded that the Mexican Government could have granted a part of its tideland to the pueblo and that such a grant would have had to be confirmed and surveyed accordingly. But the decision rested on no such ground. Primarily, it involved the conclusiveness of the survey as a determination of the "ordinary high-water mark" which was one of the boundaries of the grant *as confirmed.* This problem having been determined in favor of the Federal patentee, the court then considered the secondary contention that the state's title to tideland was superior to any title acquired under a Mexican grant, an argument resting upon the assumption of an actual grant of land below high-water mark. The discussion was really *obiter;* for the confirmation decree extended the grant only to "ordinary high-water mark" and the court had already held this line to be conclusively established before it approached the other question of relative superiority of Mexican and state tideland titles; that question had thus become academic. At least, it had no controlling influence upon the point already decided, i. e., the conclusiveness of the departmental delineation of the boundary line incorporated in the confirmation decree.

Mr. Justice Field said at page 214 of 142 U. S.:

> "No claim was ever made in the pueblo case for any part of the seashore. * * * The claim of the pueblo was for land above the ordinary high-water mark of the bay, not for any land covered and uncovered by the tides, either daily or when they reach their highest point during the year."

He also pointed out, at pages 206-7, the origin of the phrase "above ordinary high-water mark" and the fact that its insertion in the decree was carefully made to avoid any question of the correct boundary on the bay and ocean sides.

Survey Not Subject to Judicial Review.

As the law existed at that time, the court proceeding ended with the decree of confirmation. While there appears to have been prior to 1860 an implied power in the courts to review such surveys when made under the Act of 1851 "to settle private land claims," which power was expressly recognized by the Act of June 14, 1860 (12 St. at L. p. 33, Secs. 2 and 3), the legislative policy in this respect was reversed in 1864, at which time the *Act of June 14, 1860, was repealed and the court's jurisdiction pertaining to surveys expressly abrogated.* We quote *Cragin v. Powell* (128 U. S. at 697):

> "The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the Act of June 14, 1860, 12 St. at L. 33, in relation to Mexican land claims, which was repealed in 1864, 13 Stat. at L. 332."

The Act of July 1, 1864 (13 Stat. 332), was entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California." Section 1 thereof provides:

> "That whenever the surveyor-general of California shall, in compliance with the thirteenth section of an act entitled 'An act to ascertain and settle the private land claims in the State of California,' approved March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the

same has been done by a publication, once a week for four consecutive weeks, in two newspapers, one published in the city of San Francisco, and one published near the land surveyed; and shall retain in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same, and transmit a copy of the survey and plat thereof to the commissioner of the general land-office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days, by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the surveyor-general shall transmit to the commissioner of the general land-office at Washington a copy of the survey and plat, and objections, and proofs filed with him in support of the objections, and also of any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said commissioner he shall indorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California, touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are

corrected, or a new survey and plat are made in conformity with his directions, he shall indorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the commissioner of the general land-office, it shall be the duty of the said commissioner to cause a patent to issue to the claimant as soon as practicable after such approval."

It was then provided, in section 2 and subsequent sections, that the act should not interfere with the exercise of judicial power with respect to any survey *already* brought within the court's jurisdiction, but in section 3, after providing that the Circuit Court under certain circumstances might "order the case back to the surveyor-general for a new survey," it was further provided "when the case is ordered back for a new survey, the subsequent survey of the surveyor-general shall be under the supervision of the commissioner of the general land office, and *not of the district or circuit court of the United States.*"

It is obvious that the Knight survey, made in 1867, was not subject to court supervision and therefore stood upon an exact parity with the Norway survey of Mormon Island. This was pointed out in *People v. San Francisco,* 75 Cal at 397.

The chart and compass of the Land Department was the language of the court decree; it was charged solely with the duty of delimiting the "ordinary high-water mark" of the "Bay of San Francisco." It had nothing to do with the extent or validity of the Mexican grant; that was determined for it by the court decree and its sole function was to mark out the lines as there described. See *Knight* decision at page 170.

The Discussion of Mexican Grants.

We repeat that the crucial question in the *Knight* case was the conclusiveness of the Land Department's survey of the line of ordinary high tide—not the effect of the grant as extending title below that line. True, Mr. Justice Lamar discussed the latter question at some length (p. 183), holding that the Mexican Government could have included tideland in its grant had it seen fit to do so. But this discussion was in answer to the secondary contention (pp. 164, 184) that the *court decree* did not bind the sovereign state of California as to the *title* conveyed and confirmed—a claim that a Mexican grant of tideland was not good against the state and that the state was not bound by the court proceedings. (See plaintiff's point 3rd at p. 166 and 5th (d) at p. 167 of 142 U. S.) The discussion, therefore, had no bearing upon the jurisdiction of the Land Department to make its survey or the conclusiveness of the lines established by it; it went back of that to the integrity of the decree of confirmation, and hence should have no influence upon our present problem.

People v. San Francisco, 75 Cal. 388, reviews this matter of the effect of a Mexican grant; it being held that the state's tideland title was acquired subject to the paramount power of the Federal Government to determine title and location of such grants (p. 398). But the court had already upheld the conclusiveness of the survey (p. 397) and had done so without reference to any effect of the Mexican grant. Moreover, the ruling had been made upon demurrer and in the face of an allegation that the survey did in fact include tidelands. And the case did not involve a state's grantee; the sovereign itself was plaintiff in the action.

Though this decision was questioned in *United Land Assn. v. Knight*, 85 Cal. 448, it has, since the reversal of the *Knight* case by this court, been recognized as sound law, having been cited with approval in *DeGuyer v. Banning*, 91 Cal. 402; *Valentine v. Sloss*, 103 Cal. at 220, and *Taylor v. McConigle*, 120 Cal. at 126.

Other California decisions which adhere to the same rule as the *Knight* and *San Francisco* cases, *supra*, are:

Teschemacher v. Thompson, 18 Cal. 11, 25;
Waterman v. Smith, 13 Cal. 373, 411;
Leese v. Clark, 18 Cal. 535, 571;
Valentine v. Closs, 103 Cal. 215;
Jameson v. James, 155 Cal. 275, 278;
Gage v. Gunther, 136 Cal. 338,343;
Weaver v. Howatt, 171 Cal. 302, 305;
Broome v. Lantz, 211 Cal. 142, 150.

Bearing in mind the fact that the decree of confirmation discussed in the *Knight* and *San Francisco* cases adjudged the boundary to be ordinary high-water mark, there could be no more logic in permitting a Federal survey of such Mexican grant to trespass on and divest state tideland than in sanctioning the same thing through a survey of the public domain.

ERRONEOUS HOLDING THAT THERE WAS NO AUTHORITY FOR NORWAY SURVEY.

The Circuit Court's second ground of attempted distinction of the *Knight* case is that the Surveyor General was performing an express statutory duty in the first instance, and that "No authority was vested by law in the Surveyor General to determine the boundary line between the tideland belonging to the state and the upland belonging to

the United States" [R. 721] with respect to Mormon Island. With this is coupled the further statement that "Even if it be conceded that such jurisdiction existed in the Federal Government there was no attempt to exercise such jurisdiction." [R. 721.]

JURISDICTION WAS ACTUALLY EXERCISED.

First, did the Federal Government actually attempt to exercise such jurisdiction? The requirements of the Norway contract are quoted at page 8, *supra;* also the survey notes and their approval, at pages 8-9.

The plat [R. Vol. II, p. 31], which bears the Surveyor General's approval and certifies that the "area of *public* land surveyed by Norway" is 18.88 acres, likewise shows that each station or meander corner was located at "ordinary high-water mark" and that the traverses, designated as meanders, were "of the shore of Mormon Island" and "along the shore of the island."

The patent itself conveys the property as lot one "containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands." [R. 660.] The answer alleges [R. 48] and the reply admits [R. 113] "that the boundaries of the said Lot One, as so conveyed, *were the boundaries as shown on the said plat* or map and as described in the said field notes of the said Norway." This could refer to but one thing—the traverses of the survey, the so-called "meander lines"; for there were no other boundaries shown or indicated upon or deducible from said map.

We have already quoted (page 10) other admissions to the same effect made by respondent at the trial and in its opening brief on appeal.

We submit there is no escape from the conclusion that the Land Department studiously exercised its claimed jurisdiction to fix the location of the "shore" or tide line and that it officially certified this to have been done.

Whatever may be found with respect to the "meander lines," it cannot be denied that the Department deliberately located, platted and certified to the existence of the corners or stations of the survey as being at the locations for which we now contend. Unless there was an absolute want of jurisdiction, there can be no avoidance of the conclusion that those stations are conclusively established at the locations indicated by Norway.

STATUTORY AUTHORITY MORE SPECIFIC THAN IN KNIGHT CASE.

As to the legal question of whether any "authority was vested by law in the Surveyor General to determine the boundary line between the tideland belonging to the state and the upland belonging to the United States." First, we call attention to the fact that the survey made in the *Knight* case unquestionably meandered the bay on the north and east and the ocean on the west; and it was made under a statute which was couched in general terms. That statute, 13 Stat. 332, provided, in section 7 (p. 334):

> "That it shall be the duty of the surveyor-general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim."

No greater particularity is there found. But the statutes relating generally to surveys of public lands in California (under which the Norway survey fell) are far more explicit. The Act of March 3, 1853 (10 Stat. 244, Ch. 145), which related solely to public lands in California, provided, in section 3 (p. 245), that the Surveyor General

"shall engage a sufficient number of skilful surveyors as his deputies, whom *he shall cause* to survey, measure, and mark base and meridian lines through such points, and perpetuated by such monuments, and such other correction parallels and meridians as may be prescribed, and also to *survey and establish the other lines of the public lands.*"

Again, in prescribing compensation, we find this language:

"and for surveying the base and meridian lines, and private claims, and *meandering navigable waters*, the deputy surveyor shall be allowed not exceeding sixteen dollars per mile."

Clearly we have in this statute a congressional command to the Surveyor General to *survey* and *establish all boundary lines* of public lands in California, regardless of whether the rectangular survey be found wholly applicable; and that this referred to boundaries such as streams, estuaries, bays and oceans is made clear by the fixing of a stipend for "meandering navigable waters." Herein we find a distinction between the statute under which Von Leicht operated in the *Knight* case and that governing Norway. The former had only *inferential statutory authority;* he meandered the bay and ocean because that was necessary to carry out the confirmatory decree. *Norway's statutory command* (supplemented by a more specific one from the Commissioner of the General Land Office) was to *survey* and *establish all lines,* and to do so with reference to the *"high-water mark."*

The further sentence of section 3 of the Act of 1853:

"He shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands,"

reflects a clear intent to place general surveys of public lands upon a plane at least as high as the surveys of confirmed Mexican grants.

The least that can be said with respect to this Statute of 1853 is that there was *not* a lack of jurisdiction to fix the meander corners of any navigable waters bounding federal public land within the state of California.

In the nature of things no survey of Mormon Island could be made without establishing tide lines; there were no other boundaries; to deny this power is to deny any right of survey whatever. (See language of Field, J., 142 U. S. at 205.)

The language of *Stoneroad v. Stoneroad*, 158 U. S. 240, at 250, is also apposite.

History of Statute of 1853.

Lest the applicability of the Statute of 1853 be doubted, we call attention to its history, which is, in part, reflected in the historical note to section 52, title 43, U. S. C. A. The 1853 Statute confers like powers to those possessed by the Surveyor General of Louisiana, who in turn was given the same powers as those of the Surveyor of Lands of the United States South of the State of Tennessee, etc. (4 Stat., Ch. 116, Sec. 1, p. 492; 2 Stat., Ch. 27, Sec. 11, p. 233; 2 Stat., Ch. 55, pp. 73-78), until we reach the ultimate ancestor of all these grants of power in the Act of May 18, 1796, relating to the sale of lands in the Northwest Territory (1 Stat. 464, Ch. 29). This statute, in section 1, requires the Surveyor General to cause his deputies "without delay, to survey and mark the unascertained outlines of the lands lying Northwest of the River Ohio," etc. The Statute of 1853 was not amended or repealed until March 3, 1925 (43 Stat. 1144, Ch. 462), if, indeed, it then occurred. (See R. S., Sec. 2218.)

The Revised Statutes incorporated in section 2223 a summary of the general rules for surveying public lands, in language similar to our present section 52, title 43, U. S. C. A.; but the fact that that codification was in effect at the time of the Norway survey did not detract from his right and duty to follow the provisions of the Act of 1853, for the reason that the Revised Statutes were not intended to supersede it.

Section 5596, relating to repeals, contained a saving clause concerning any statute of which only a part was incorporated in the Revised Statutes, viz.: "any provision of a * * *, local or temporary character * * * shall remain in force." The Statute of 1853 contains ample internal evidence that it was local in the sense of being confined wholly to surveys of public lands in the State of California and temporary in the sense that it would automatically expire upon completion of that survey. It is entitled "An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes." Section 3, immediately preceding the portion quoted at page 68 hereof, defines the duties of the Surveyor-General as follows:

> "And be it further enacted, That the said Surveyor-General shall have the same power and authority, and perform the same duties respecting the public lands and private claims *in the State of California*, as by law appertain to and are required of the Surveyor-General in Louisiana, except so far as the same may be modified by this act."

Its temporary nature is emphasized by the Act of June 12, 1840 (5 Stat., Ch. 36, p. 384), later incorporated in

R. S., section 2218, which was applicable to all public surveys and provided:

> "That it shall be the duty of the Secretary of the Treasury to take all the necessary measures for the *completion of the surveys,* in the several districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district or state shall be completed, the surveyor general thereof shall be required to deliver over to the Secretary of State of the respective states, including such surveys, or such other officer as may be authorized to receive them, all the field notes, maps, records, and other papers, appertaining to land titles, within the same; and the *office of surveyor general, in every such district, shall thereafter cease and be discontinued.*"

EXPRESS STATUTORY AUTHORITY NOT NECESSARY TO LAND OFFICE JURISDICTION.

But a comparison of express statutory powers should be unnecessary, for the decisions of this court have placed surveys under the California Act to Settle Private Land Claims on an exact parity with those made under general laws.

To begin with the case of *Cragin v. Powell,* 128 U. S. 691, rested upon the general statutory provisions. The author of that opinion was Mr. Justice Lamar. It involved the settlement of the boundary line between a Federal grant of upland and a state grant of land derived from the United States apparently as swamp land; there was no express statutory authority involved. The ruling was predicated entirely upon provisions of the Revised Statutes, general in their nature, which are substantially

those now found in 43 U. S. C. A. as sections 2; 751, par. 7; 752, par. 2, and 1201. The essence of the decision is found in this quotation from page 698 of the report:

> "That *the power to make and correct surveys of the public lands belongs to the political department of the government,* and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, *like that of other special tribunals,* upon matters within their exclusive jurisdiction, *are unassailable by the courts,* except by a direct proceeding; *and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient.*"

Moreover, Mr. Justice Lamar specifically held the *Cragin* decision to be controlling in the *Knight* case; see page 176 of the report, quoted above. He did not base his decision upon any statute pertaining peculiarly to survey of private land claims; on the contrary, he relied primarily, if not exclusively, upon the general sections of the Revised Statutes, such as sections 441, 453 and 2478 (see pp. 177, 181). He definitely held that the authority of the Department under these sections is fully as great as under any statute pertaining to the survey of private land claims. See page 181 of the report.

Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 167:

> "It may be laid down as a general rule, that in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land

Office, under the supervision and direction of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

To the same effect, see:

Russell v. Maxwell Land Grant Co., 158 U. S. 253, 256;

Stoneroad v. Stoneroad, 158 U. S. 240, 247.

The case of *Brown v. Parker*, 127 Mich. 390, is also directly in point.

DATE OF VESTING OF TITLE TO TIDELAND IMMATERIAL.

The opinion below suggests the thought [R. 721] that the case of *Brown v. Parker, supra*, and the *Cragin* case might be differentiated upon the ground that they involved surveys made prior to the grant from the Federal Government to the state. This, we submit, is of no legal consequence, for the state assumes its sovereign status in subordination to all powers expressly or impliedly granted or reserved to the Federal Government. In the case of Mexican grants state title is acquired subject to performance of treaty obligations of the Federal Government or its obligation under the law of nations; in California swamp land cases (such as *Foss v. Johnstone*, 158 Cal. 119) state title is taken subject to express statutory provisions concerning the method of identification, etc.; it logically follows that tideland titles are also taken subject to the exercise of any other paramount Federal powers.

"'In this respect *no distinction can be made between the lands acquired by her through federal grants and such as she took by virtue of her sovereignty*.'" (Field, J., 142 U. S. 202.)

If the power to define boundaries is an incident to the exercise of the Federal Government's constitutional function concerning public land (as must be conceded), any people, upon acquiring statehood subject to that paramount power, must submit not only to the laws which Congress has already passed, but also to any future exercise thereof, such as the enactment of the Statute of 1853. In other words, a new state takes its title to tidelands subject to the express grant of power to Congress to "dispose of and make all needful rules and regulations" concerning its public lands; this means, subject to its exercise of power to survey the boundaries thereof.

It is the same type and degree of subordination which pertained to tideland adjoining the San Franscisco Pueblo grant. In the one case, the prior title is vested in the Federal Government; in the other, in the grantee of Mexico. In each case the state takes subject to a prior title, which carries with it the incidental right of delimitation of boundaries through the instrumentality of the special tribunal created by the higher power, the Federal Government.

In a sense the State's title to tideland adjoining public domain is in abeyance until identification through delimitation of boundaries. Such was the holding of this court in *U. S. v. Coronado Beach Co.*, 255 U. S. 472, 487, in which it was said concerning tidelands adjoining a Mexican grant:

> "The questions whether there was such a prior grant, *and what were its boundaries,* were questions that had to be decided in the proceedings for confirmation, and there was jurisdiction to decide them as well if the decision was wrong as if it was right. The *title of California was in abeyance until those issues were determined,* as the decree related back to the date of the original grant."

This is also the condition of title to a swamp land grant prior to survey (*Wright v. Roseberry,* 121 U. S. 488, 500, 509; *Tubbs v. Wilhoit,* 138 U. S. 134, 137), and, indeed, represents the rule pertaining generally to grants whose boundaries are not initially defined (*Wright v. Roseberry, supra*). Logically, the rule should apply at bar, for the State's title to tideland is on a parity with an express grant of swamp lands or other public domain (*Ward v. Mulford,* 32 Cal. at 372; *Knight v. United Land Ass'n,* 142 U. S. at 202, per Field, J).

Appeal Within the Department the Only Remedy for Error.

The remedy for errors in such Land Department surveys has at all times been that of appeal to the Commissioner of the General Land Office and from him to the Secretary of the Interior. This was clearly the rationale of the *Cragin* and *Knight* decisions, *supra,* and of *People v. San Francisco,* and *Foss v. Johnstone, supra.*

See, also:

Haydel v. Dufresne, 17 How. 23, 30;
Pueblo of San Franscisco, 5 L. D. 483, 494.

Land Department Decisions on Facts Binding Upon States and United States.

The fact that the states, as well as private individuals, are confined to the remedy prescribed by the Department of the Interior for correction of errors in boundary surveys necessarily follows from the decisions which hold the states and the Federal Government itself to be concluded by the decisions of the Department as to all factual matters concerning quality, boundaries, etc., of lands claimed by a state or by the United States.

United States v. Coronado Beach Co., 255 U. S. 472, 488, holds that the United States itself is bound by such Land Department findings and cannot collaterally attack the same. This is also the holding in *Beard v. Federy*, 3 Wall. 478, quoted at pages 52-54, *supra*.

And the *Knight* case, *supra*, *People v. San Francisco*, *supra*, and *Foss v. Johnstone*, *supra*, equally establish the conclusive nature of the departmental finding upon claims of states.

See, also:

State of New Mexico, 53 L. D. 113.

Swamp Land Boundary Cases.

Cases dealing with lands claimed to have been "swamp and overflowed lands" present a strictly analogous legal situation, for they involve a determination of the exclusiveness of the jurisdiction of the Land Department and of the binding effect of its determinations upon the respective states. They hold that the matter of identifying the lands and delimiting them is committed exclusively to the Department and that its decision of any factual matter, such as boundary, when it has become final within the Department, is conclusively binding upon the states as upon individuals. And, as we have pointed out, the boundary of swamp lands adjacent to the seashore necessarily involves the same question as the upper boundary of tideland,—the line being coincident.

Foss v. Johnstone, 158 Cal. 119;
Bates v. Halstead, 130 Cal. 62;
Cragin v. Powell, 128 U. S. 691;
Northern Pac. R. Co. v. McComas, 250 U. S. 387, 392;
Heath v. Wallace, 138 U. S. 573, 585;
French v. Fyan, 93 U. S. 160, 171;
Chandler v. Calumet etc. Co., 149 U. S. 79, 90;
50 *C. J.*, Sec. 265, p. 1001; Sec. 268, p. 1003.

RESPONDENT'S AUTHORITIES DISTINGUISHED.

Confusion Between Error in Exercise of Jurisdiction and Want of Jurisdiction.

In their effort to escape the effect of the foregoing decisions, counsel for respondent have fallen into the mistake of confusing a total want of jurisdiction over the subject matter with an error in the exercise of such jurisdiction.

In its brief in opposition to petition for certiorari herein respondent argued that tidelands are not "public lands" which the Land Department has jurisdiction to convey and invoked the analogy of certain instances "where patents for land have been issued and have been declared void * * * as follows:

(1) The lands patented were not at the time public property;

(2) If at the time the lands were patented they had been previously disposed of;

(3) No provision had been made for their sale or other disposition;

(4) The lands patented had been reserved from sale." (p. 40.)

It may be readily conceded that tidelands are not "public lands" in the sense of being subject to entry and sale and that the Federal statutes have made no attempt to extend public grants below the ordinary high-water mark. And it is clear from the decisions that the jurisdiction of the Land Department is limited to "public lands," *i. e.*, those open to entry and sale, and its action with respect to lands

which are not "public lands" is a nullity and subject to attack at any time or place because totally wanting in jurisdiction. But the determination of *facts* such as *boundaries* pertaining to lands which are actually "public lands" (e. g. Mormon Island), involves an exercise of existing jurisdiction and *any erroneous determination presents merely the familiar case of error in the exercise of jurisdiction* and does not result in an ouster thereof.

Respondent's arguments are almost identical with those of the California Supreme Court in *United Land Assn. v. Knight,* 85 Cal. 448, which were rejected by this court. That decision relied, as does respondent at bar, upon such cases as *Smelting Co. v. Kemp,* 104 U. S. 636; *Steel v. Smelting Co.,* 106 U. S. 447; *Wright v. Roseberry,* 121 U. S. 488; *Doolan v. Carr,* 125 U. S. 618. These and similar cases are cited in the main opinion of the *Knight* case, wherein it is said that:

> "Ever since the decision in Polk v. Wendal, 13 U. S., 9 Cranch. 87, it has been the settled law of this state that a patent is void at law if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law." (page 176).

But it was held that that principle and those authorities were inapplicable.

It so happens that Mr. Justice Field participated in all of the last mentioned decisions and that he wrote the opinions in *Smelting Co. v. Kemp, Steel v. Smelting Co.,* and *Wright v. Roseberry.* In the *Kemp* case, it plainly appears that the court considered such circumstances as those instanced by respondent to present a total want of jurisdiction over the subject matter. At page 641 it is said:

"The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and *goes to the existence of a subject upon which it was competent to act.*"

At page 645:

"So, also according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the *qualification, that when the authority depends upon the existence of particular facts or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.*"

And at 646:

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had *no jurisdiction* to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it, is not assailed nor is the regularity of its proceedings called into question; but *its authority to act at all is denied* and shown never to have existed."

Wright v. Roseberry, at page 519, and *Doolan v. Carr*, at page 625, contain language to the same effect. We have quoted at pages 55-6, *supra*, Mr. Justice Field's observations concerning the attempt to apply those cases to situations such as the instant one.

Other cases cited in said respondent's brief involved situations resulting in a total want of jurisdiction.

In *Hardin v. Jordan*, 140 U. S. 371, 372, 400, the main question decided was whether, as a matter of law, the title conveyed by a Federal patent extended to the center of a lake or only to the water's edge. It was held that the Federal grant runs only to high water mark and that the rights of riparian owners *below* that line are to be governed by state law; the court then proceeded to apply the Illinois law to the situation. So far as it touches upon the question in hand, the case merely held that there was no jurisdiction in the Land Department in 1874 to survey and determine title to land which had been patented by the Government in 1841 pursuant to the official survey of 1834-5. No survey of the Land Department was under attack; no claim made that its meander line was incorrect. Mr. Justice Field participated in this decision, which was decided the same year as the *Knight* case, *supra*.

Lake Superior etc. Co. v. Cunningham, 155 U. S. 354, holds that there is no jurisdiction in the Land Department with respect to premises previously conveyed by the Government and thus separated from the public domain. On the facts this case is similar to the three opinions of Mr. Justice Field in 104 U. S., 106 U. S. and 121 U. S., *supra*. In the *Lake Superior* case the court, referring to the line of authorities upon which appellant relies, said at page 375: "But those cases are not pertinent, for here there was no question of fact to be determined

* * * but one of law,"—thus bringing the situation within the purview of the later case of *West v. Standard Oil Co., supra.*

Two California cases cited by respondent fall in the same category. *Edwards v. Rolley,* 96 Cal. 408, applied the rulings of the two *Smelting Company* cases, *supra,* to a situation wherein plaintiff claimed, under a grant from the state, certain lands as swamp and overflowed lands, but the court said that they had not been acquired from the Federal Government as such swamp and overflowed lands and that they were "not swamp and overflowed land within the meaning of those laws." In other words, it was determined as a question of law that the state had no jurisdiction to make the grant. The distinction is clearly drawn in the later case of *Gage v. Gunther,* 136 Cal. 338, 343.

People's Water Co. v. Perkins, 34 Cal. App. 513, involved certain land which was within the confines of a railroad grant. Defendant relied upon a patent under the homestead laws which was issued long after the railroad grant was made. The case follows the rule of the *Smelting Company* cases, *supra,* and holds that *there was* no jurisdiction to make the homestead patent.

Brown v. Luddy, 121 Cal. App. 495, is the same type of case.

Doolan v. Carr, 125 U. S. 618, presented essentially the same kind of want of jurisdiction. The plaintiff there claimed under a patent issued pursuant to a railroad grant. Defendant offered to show that the land in question was, at the time of the issuance of the patent, included within the claimed boundaries of a Mexican grant and that the matter was then *sub judice.* The court held, as a matter

of law, that the said claim severed the land temporarily from the public domain and, for the time being, suspended the jurisdiction of the Land Department in the premises.

When Judicial Question Is Presented.

The *Maxwell Land Grant Company* case, *supra*, together with those just discussed, fairly cover the territory of judicial questions arising in relation to Land Department surveys and patents. When the Department has wholly failed or refused to exercise its function of passing upon the factual matters submitted to it, as in *Wright v. Roseberry*, the parties may have a judicial determination of their respective rights, there being no collateral attack upon a Land Department adjudication involved. Or where the Department has no jurisdiction whatever because the land surveyed or patented is not "public land," either because it has been already conveyed (as in *Hardin v. Jordan*) or has never been opened for sale and disposition or has been expressly reserved or temporarily removed from the public domain, there is likewise a judicial question presented; the *Smelting Company* cases and *Doolan* case are typical of these situations; the judicial question in such cases is whether the Department had jurisdiction over the subject matter of its action; whenever this can be answered affirmatively the judicial inquiry must terminate. Again, as the exclusive jurisdiction of the Land Department is confined to determinations of matters of *fact*, any action on its part which proceeds in manifest violation of *law* can likewise be corrected by the courts; exemplified by *Lake Superior* and *Edwards* cases, *supra*. And, as shown by the *Maxwell* case, *supra*, after the Land Department has surveyed and established the boundaries of public land, a judicial question arises when-

ever necessary to settle a dispute as to whether a given parcel lies inside or outside the line so established; but, as there indicated, this is a far different thing from attacking the Land Department survey itself, for that is a determination of factual matters which are exclusively committed to its jurisdiction. See quotation from *Maxwell* case, at p. 45, *supra*.

In support of the proposition that the location of tideland boundary line is always a judicial question, respondent in the lower court relied upon *Ord Land Co. v. Alamitos Land Co.*, 199 Cal. 380; but the case presents the reverse of the proposition for which it was cited. That is to say, the appellant in that case attempted to apply to a state tideland patent the rule pertaining to action of the Land Department upon matters committed to its jurisdiction. Appellant there overlooked, as the California court apparently did, the fact that the General Land Office has been created as a special tribunal having judicial powers and exclusive jurisdiction with respect to the delimitation of public lands, and that this has been done pursuant to the paramount authority of the Federal Government, subject to which all public lands vesting in the State of California, whether swamp land or tideland, were acquired and are held. But there has been no attempt to exalt the survey of a county surveyor (made pursuant to the state statute for disposition of tidelands), to a parity with a survey of the Land Department. Indeed, it was held in *Heath v. Wallace*, 138 U. S. 583, that such surveys made by the county surveyors pursuant to the local statute, "were, in reality, mere private surveys." This was cited with approval in *Foss v. Johnstone*, 158 Cal. at 132.

The contention of appellant was rejected in the *Ord* case, though the reasoning is far from convincing, for

the court relied largely upon a statement in 26 *Am. & Eng. Ency. of Law,* 347-8, which, so far as it relates to action of the Federal Government, does not correctly state the established law. (See 50 *C. J.,* Sec. 265, pp. 1001-2; *Foss v. Johnstone, supra.*) Being influenced by this misstatement of the law, the court misconceived the true basis of its former decision in *Edwards v. Rolley,* 96 Cal. 408, and totally misapplied the *Knight* decision. In its result the *Ord* decision is doubtless sound, for the holding is that the action of the state in issuing a tideland patent is not conclusive with respect to later action of the Land Department in making a survey and issuing a Federal patent; but the reasoning of the decision is, we submit, totally at variance with the Federal authorities and, the question being strictly a Federal one (*Foss v. Johnstone,* 158 Cal. at 130), the state decision must be disregarded under these circumstances.

POLLARD'S LESSEE V. HAGAN AND SIMILAR CASES DISTINGUISHED.

The cases of *Pollard's Lessee v. Hagan,* 3 How. 212; *Goodtitle v. Kibbe,* 9 How. 471, and similar cases would be pertinent if respondent's assumption of established and conceded tideland were permissible. But correctly understood, they lend no support to respondent's position.

They do stand for the proposition that upon admission of a new state to the Union it is vested with title to lands below "ordinary high water mark" and that the Federal Government no longer has authority to issue patents to lands *conceded* to be so situated. But those cases do not

involve action of the Land Department; nor are they concerned with the conclusive nature of its determination of factual matters such as the location upon the ground of high water mark. Their only concern with boundary questions was the determination of what constitutes the legal boundary line,—not where it was in fact located.

The cases of *Pollard's Lessee v. Hagan, et al.*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 How. 471, involved the same matters and, while it is difficult to get at the exact facts, and necessary to refer to *City of Mobile v. Emanuel*, 1 How. 95, and *Pollard's Lessee v. Files*, 2 How. 591, for an understanding thereof, a careful reading of these cases discloses that they involved the validity of an Act of Congress which had the effect of quitclaiming to the City of Mobile lands which were actually situated below high water mark (see *Mobile Trans. Co. v. Mobile*, 187 U. S. at 490), and were described as "between high water mark and the channel of the river," the act having been passed after admission of the state of Alabama to the Union (see Act of May 26, 1824, 4 U. S. St. at L., p. 66; Ch. CLXXXV). Pursuant to a later private act a patent was issued covering the demanded premises.

The opinions clearly indicate that the issuance of the patent was specifically required by the later Congressional Act. Examination of the statute confirms this. It is Chapter CCCXLIV, found at page 680 of Volume 6 U. S. St. at L.,—Private Laws 1789-1845, Inclusive,—reading as follows:

> "Chap. CCCXLIV—An Act for the relief of William Pollard's heirs.
>
> *Be it enacted, etc.*, That there shall be, and hereby is, confirmed unto the heirs of William Pollard, de-

ceased, a certain lot of ground, situated in the city of Mobile, and bounded as follows, to wit: on the north, by what was formerly known as John Forbes and company's canal; on the west by Water street; on the south, by the King's wharf; and on the east, by the channel of the river; and that *a patent shall issue in the usual form for the same: Provided,* That this act shall only operate as a relinquishment, on the part of the United States, of all their right and claim to the above described lot of ground, and shall not interfere with or affect the claim or claims of third persons." (Approved, July 2, 1836.)

It nowhere appears that there was any survey by the Land Department. *It is certain that no question of the effect of such a survey was considered or discussed.* In fact, the only question to which the opinions in 3 How. 212 and 9 How. 421 were directed was the relative rights of Federal and state government, after admission of the State to the Union, to lands below high water mark; it was held that the state takes the same by virtue of its sovereignty and this *is all that the decisions hold.*

Wright v. Roseberry, 121 U. S. 488, 497:

"* * * the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself."

The net result of all the cases is that the Land Department within its limited field of inquiry is a special tribunal invested with judicial functions and its determination of questions so committed to it is final and conclusive (except upon appeal within the Department of the Interior), because, forsooth, *those matters have been withdrawn by Act of Congress,* in the exercise of the sovereign power of the United States, *from the field of judicial*

inquiry by the courts. When, and only when, the Land Department has failed to exercise its functions or has transgressed beyond its legitimate province can the courts interfere with its action. (See *United States v. Schurz,* 102 U. S. 378; *New Dundenberg M. Co. v. Old,* 79 Fed. 602, 604 (8 C. C. A.).)

THE INSTANT ACTION IS A COLLATERAL ATTACK UPON A LAND DEPARTMENT ADJUDICATION.

While the complaint at bar purports to be an action to quiet title, it was essentially one in ejectment (*Gillespie v. Gouly,* 120 Cal. 516; *Keele v. Clouser,* 92 Cal. App. 526; *Wood v. Phillips,* 50 Fed. (2d) 714; *Browne v. Poole,* 44 Fed. (2d) 125) and falls squarely within the purview of the *Knight* and similar decisions holding such actions to be collateral attacks upon the Federal patents which they challenge. Indeed, if this be treated as an action to quiet title, it is still a collateral attack upon the patent. (See *Newlove v. Mercantile Trust Co.,* 156 Cal. 659, 663; *Garrison v. Blanchard,* 127 Cal. App. 616, 619; *Weaver v. Howatt,* 171 Cal. 302.)

But the rule of collateral attack, as applied to the present situation, is not limited to or affected by the mere form of the action, whether at law or in equity. See the language of Mr. Justice Field quoted at page 33, *supra.*

Jameson v. James, 155 Cal. 275, 279, is directly in point.

See, also:

U. S. v. Coronado Beach Co., 255 U. S. 472, 488;
U. S. v. Throckmorton, 98 U. S. 61, 69-70;
Nor. Pac. R. Co. v. McComas, 250 U. S. 387, 393.

POINT II.

The Circuit Court of Appeals Erred in Ruling That, as Matter of Law, the Traverses of the Norway Plat Were Not Boundary Lines and That the Meander Corners Could Be Lawfully Rejected.

(Specification of Error No. 3.)

The trial court made this finding of fact:

> "* * * that the *boundaries of the said Lot One*, as so conveyed, were *the boundaries as shown on the said plat or map* and as described in the said field notes of the said survey; that *included within the said Lot One* as so conveyed by the said patent are *all of the lands described in the plaintiff's bill of complaint* herein and claimed by it to be tideland or submerged land." [R. 170; see also R. 168.]

The Circuit Court of Appeals said:

> "It is clear from the plat that the lines in question were meander lines, and therefore that the boundary line of the land covered by the patent is the shore line of Mormon Island and not the traverse lines of the patent" [R. 716]; and "These principles are insisted upon by the appellant and are not disputed by the appellees" [R. 718].

Our position on this was misunderstood. We have always contended that this is a question of fact upon which the court's finding is conclusive because supported by ample evidence,—indeed by explicit admissions, quoted at page 10, *supra*.

Question of Fact Whether Traverses Are Boundaries.

It is true that the lines of the plat were designated by the surveyor and the draftsman as "meander" lines; but the use of this phrase is not controlling, for, as said in *United States v. Lee Wilson & Co.*, 214 Fed. 630, 637 (affirmed in 245 U. S. 24), it is "well settled by the decisions of the Supreme Court of the United States that the making of a meander line has no certain significance." There is no "magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation." (*Niles v. Cedar Point Club*, 175 U. S. at 308.)

It is doubtless the general rule that meander lines of public lands are run primarily for the purpose of ascertaining the quantity of land subject to sale, rather than fixing definite boundaries; and that the water course, not the meander line, constitutes boundary. But the rule has no such universal application as has been indicated by the Circuit Court of Appeals, which held that, as a matter of law, a meander line cannot constitute a definite boundary. The authorities are to the contrary; they clearly establish that it is a question of fact whether a given meander line is intended as a boundary. The leading case is *Producers Oil Co. v. Hansen*, 238 U. S. 325, 339. That case dealt with a traverse which the surveyor designated as a meander line and which throughout the opinion is referred to as "the Bristol meander line." The surrounding facts were held to prove that the line in question was actually a boundary and not a true meander. Respondent's brief in opposition to certiorari concedes (Br. p. 12) that

it "may be a question of fact" whether a meander line is in fact a definite boundary.

The complaint at bar assumes and inferentially alleges the demanded premises to be within the confines of the patent [R. 12-13]. The answer affirmatively asserted this [R. 48], and it was admitted by the reply [R. 113]. The trial judge so construed the pleadings [R. 161, 162]. We have quoted at page 10 hereof the concessions made by counsel at the trial and in the brief in the Circuit Court.

These concessions relieved the defendants of the necessity of developing the facts and circumstances which would establish that the real intent and agreement was that the "meanders" should constitute boundaries. Considerable emphasis was placed upon such admissions of the parties in the *Producers Oil* case (see p. 337 of 238 U. S.).

Diverse Functions of Meanders.

The Circuit Court's ruling actually subverts the beneficent purpose of the meander rule, which was one of enlargement of titles through carrying the buyer's boundary beyond the meander to the actual bank or thread of the stream. The ruling at bar gives a reverse application to the rule, through holding that neither the meander corners nor the meander lines have any legal significance after the purchase price has been once determined; that they neither conclusively nor *prima facie* establish the actual location of a boundary.

Meander lines serve more purposes than the one mentioned in the opinion. *Wilson & Co. v. United States*, 245 U. S. 24, 29, holds it to be a proposition which is "undisputable because conclusively settled by previous decisions," that:

> "Where, in a survey of the public domain, a body of water or lake is found to exist and is meandered the *result of such meander is to exclude the area from the survey* and to cause it, as thus separated, to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several states."

The application of this at bar means that the meander line of the Norway survey definitely excludes everything outside it as being not a part of the public domain and, by the same token, it should follow that the patentee should take up to the said line. The United States was bound by the survey in this regard. (See *U. S. v. Coronado Beach Co.*, 255 U. S. 472, 488.) Why should the state be not equally bound? In the case of *Brown v. Parker*, 127 Mich. 390, 392, it is said:

> *"We recall no case, however, that holds in express terms that title does not extend to meander lines.* It has frequently been said that they have two purposes,—*one to make the boundaries of the bodies of water,* the other as a means for computing acreage; and we have in mind one case where it was held that they had the further purpose of *defining the extent of ownership,* where the meander was not on a body of water, but upon a marsh, partly boggy and partly dry, subject to inundation and overflow, but not permanently covered with water, and bounded along the lake by a sand beach averaging one chain in width and three feet high."

The court below cited no authorities to the effect that the grantee's title stops short of the meander line and we, like the Michigan Supreme Court, know of no such case.

"MEANDERS" ESSENTIALLY BOUNDARIES AT MORMON ISLAND.

It should be remembered that the conditions which usually dictate meanders rather than boundaries were not present on Mormon Island.

In *Mitchell v. Smale*, 140 U. S. 406, 415, the court, speaking of resurveys, said:

> "The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream."

But in the case at bar we find no such practical difficulty; we have no tongues or projections extending beyond the general contour, no steep banks or sharp declivities, no natural obstacles to an accurate survey other or different from those found in any flat piece of land. Mormon Island, according to the opinion, "is composed of mud flats, the surface of which is in places almost horizontal" [R. 719]. It presented the simple case of running easily-defined boundaries, and was conducted in the usual manner of noting observations on the ground and interpolating

in the office [R. 400]. The reason for the meander rule ceasing, so should the rule itself.

South Florida Farms Co. v. Goodno, 84 Fla. 532;
James v. Howell, 41 Ohio St. 696;
Tolleston Club v. Lindegren, 39 Ind. App. 448.

The patent is peculiarly persuasive at bar, for it conveys lot one, "containing eighteen acres, and eighty-eight hundredths of an acre, *according to* the Official Plat of the Survey of said Lands" [R. 660]. The phrase "according to" must refer to acreage, because the legal description would have been complete without that plat reference; the island had been "officially designated as Lot One of Section 8 of Township 5 South, Range 13 West, San Bernardino Meridian" [R. 168]. And the mention of 18.88 acres was not *then related* to purchase price, for that had already been computed and paid [R. 657]. The only reasonable inference is that acreage was specified in the patent *ex industria* as a showing of intent to convey everything within the traverse lines.

Presumptions in Favor of Survey.

It is fundamental that, in favor of the action of the Land Department when within its jurisdiction, all things are presumed which are not affirmatively disclosed to the contrary by the face of the record. *St. Louis Smelting Co. v. Kemp,* 104 U. S. 636, 646 (per Field, J.):

> "Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if *in any circumstances* under existing law a patent would be held valid, *it will be presumed that such circumstances existed.*"

And from this it follows that *if mean high tide line be the actual boundary,* as held at bar, *the survey, not disclosing the contrary on its face, must be held to have established and carried by spirit leveling the elevation of the mean high tide line around the island.* This contour not being a fluctuating thing and being independent of actual depressions and elevations along the shore (those conditions which make for meandering), the meander rule must cease for its basis has entirely disappeared, and the survey is thus placed on exactly the same status as the delineation of a section line across a desert terrain.

How that elevation should be determined was a matter for the surveyor and his superiors in the Department. What should be the frequency of his observations and the resulting length of his traverse lines was likewise for them, and not a court, to determine. Any corrective measure could be had only within the Department through an appropriate appeal. As we must assume that, if necessary to a lawful survey, Norway thus carried the mean high tide line around the island, it necessarily follows that his line, being as accurate as any survey of anything other than a straight line, must be held to lack all the essentials of a "meander," which places it on a parity with the Bristol meander line of the *Producers Oil Co.* case, *supra.*

CLAIMED RIGHT TO REJECT MEANDER CORNERS.

United States v. Boynton, 53 Fed. (2d) 297 (not reviewed by this Court), is the only known support for this contention. But it turns upon the proposition that

> "Some action must have been taken, or words used in the instrument of conveyance, which will show

> that the grantor has agreed that such line shall be considered as having more than its assigned character; it must be agreed that it indicates a definite boundary limit."

And it carries a very plain inference that "a shore line survey," when used as the basis for patent, would supply this agreement upon a definite boundary; the discussion is introduced with this sentence:

> "Thus, the question we have to determine is whether Snow, in indicating a high tide line, definitely fixed *a shoreline survey.*"

There is no room for disputing the fact that Norway was engaged solely in "fixing a shoreline survey."

Moreover, the last phrase of the same paragraph says that in order for a meander to form a boundary "it must be agreed that it indicates a definite boundary limit"; the *Producers Oil Co.* case, 238 U. S. 325, establishes that this agreement can be implied as well as express. The pleadings conclusively establish the existence of such agreement at bar.

San Pedro Railroad Case Distinguished.

Los Angeles v. San Pedro, etc. R. R. Co., 182 Cal. 652 (Cert. denied 254 U. S. 636), is not opposed to these views, for there was involved *no attempt to reject any of the meander corners of the survey.* Nor was there any stipulation that the lines in question were boundaries as opposed to meanders. The sole question there determined was whether the inner bay exception line of the patent to Rancho San Pedro constituted a meander line. No attack was made upon the location of the

meander corners. The decision apparently proceeded upon the assumption that the meander corners were coincident with the shore line, and certainly did not rest upon any contrary contention or conclusion. See pages 654, 656, 661.

No question of right to reject survey stations was presented by the application to this court for certiorari. (See Nos. 464 and 465, Oct. Term, 1920.) And, of course, the denial of certiorari "imports no expression of opinion upon the merits of the case" (*Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401, 402).

MEANDERS ARE, AT LEAST, PRIMA FACIE EVIDENCE OF SHORE LINE LOCATION.

The rule seems well settled that a true meander line at least establishes *prima facie* the location of the water boundary.

In re County Ditch, etc., 151 Minn. 292, 295;
Illinois Steel Co. v. Budzisz, 115 Wis. 68, 80;
Bransfield v. Wallace, 195 Mich. 41, 47;
Little v. Williams, 88 Ark. 37, 46.

And, if we assume that the line in question is only *prima facie* correct, there is no possibility of overthrowing it without a review of the competency and weight of all of plaintiff's evidence. Said *prima facie* showing is also supported by the formal admissions of the defendant, which are sufficient in themselves to sustain the finding.

We refer particularly to the license agreement of March 28, 1928 [R. 103-108] the map attached thereto [R. 108] and the subsequent license of September, 1928

[R. 60, 119]. The recitals of ownership by defendant of premises particularly described according to the Norway survey, respondent's acquiescence in that title through entry and occupation in subordination thereto, its *agreement to surrender the premises upon termination of the license*, all fortified by the delineation of the map, constitute unequivocal admissions of petitioner's title to the disputed area which are sufficient in and of themselves to support the finding against the claim of tidelands.

This license was executed by the Board of Harbor Commissioners in formal manner, that being the branch of the city government which has control of all harbor matters, including tidelands (see article XI, city charter; Cal. Stats. 1925 pp. 1024, 1071-1078), and the said board "was duly authorized to act in the premises." [R. pp. 59, 119.]

Such admissions are binding upon the City.

Chicago v. Greer, 76 U. S. 726, 733;

Los Angeles City Water Co., et al, v. City of Los Angeles, et al, 88 Fed. 720, 743-4 (affirmed - 177 U. S. 558).

Moreover, there is not an iota of evidence in the record tending to support respondent's contention. The transcript does not reflect any substantial claim nor contain any discoverable evidence that any of the land claimed by petitioner was outside the meander line or outside the actual sinuosities of the shore.

POINT III.

Respondent's Complaint Does Not State Facts Sufficient to Constitute a Cause of Action.

This is an objection which is not cured by introduction of evidence (*National Surety Co. v. Ulmen*, 68 Fed. (2d) 330, 333 (9th C. C. A.); *United States Fidelity & Guaranty Co. v. Whittaker*, 8 Fed. (2d) 455, 457 (9th C. C. A.); *Kennedy Lumber Co. v. Rickborn*, 40 Fed. (2d) 228, 231 (4th C. C. A.).)

The complaint is fatally deficient in the following respects:

(a) It rests upon the theory that "mean high tide" line is the boundary between upland and tideland and its averments are limited to the definition of lands according to this criterion, whereas the law is well established that the boundary is not this fictitious plane, but is the "ordinary high water mark" impressed upon the land by the action of the water.

(b) The complaint alleges the mean *high tide* line to be the boundary, whereas the authorities which adopt or suggest an average line as the boundary hold it to be the line of the *neap* tides, not the average of all the highs. The complaint contains no averment as to the location of the line of the neaps.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE MEAN HIGH TIDE LINE IS THE BOUNDARY BETWEEN UPLAND AND TIDELAND.

(Specification of Error No. 4.)

The lower court and counsel for both parties agree that the legal boundary is the ordinary high water mark, as decided in *Shively v. Bowlby,* 152 U. S. 1, 13, 58, and adopted in California through Civil Code Section 830, quoted *infra.*

But the Circuit Court says that ordinary high water mark is defined by the contour of the engineering concept "mean high tide line." This contour is .8 foot higher than the mean of the neaps. [R. 334.] The importance of this ruling is emphasized by the adoption, at R. 724, of our assertion that "the lowering or raising by one-tenth of a foot may result in the gain or loss of acres, and there are only seven acres here involved."

This Theoretical Line of Mean High Tide Not Recognized in 1850 or 1880.

It is confessedly an average or imaginary line which is only properly ascertained as the result of observations for a period of 18.6 years [R. 732]. It is now applied 85 years after the event to the boundary of the tidelands acquired on September 9, 1850.

The established practice of the Land Department in 1880 and earlier years was shown to be the survey of "an actual mark as it appeared on the land" [R. 333]. Such contemporaneous construction of the law is "not to be overruled without cogent and persuasive reasons."

(*La Roque v. United States*, 239 U. S. at 64.) And there is no reason to suppose that the method indicated in the opinion was a practical one for determining tide lines in 1850 or even in 1880. Indeed, the record shows that the necessary basic information was not then in existence [see R. 393 and Book of Exhibits, p. 21].

"Ordinary High Water Mark" Means a Physical Mark Upon the Ground Made by the Waters Themselves.

No cases are cited by the Circuit Court, and we know of none, previously holding that "This rule as to a definite mark is applicable to the high water line of streams but not to a boundary line of tide waters" [R. 725].

This is a Federal question (*Shively v. Bowlby*, 152 U. S. 1, 9; *Foss v. Johnstone*, 158 Cal. 119, 130) and upon it the decisions of this court are uniform. None of them recognizes any distinction in this regard between rivers and tidal waters. Moreover, the basic reasoning of the river cases is fully applicable to the ocean shore or bays or lagoons or other tidal waters. It is stated in *Houghton v. C. D. & M. R. Co.*, 47 Iowa 370, and *Carpenter v. Board of Commissioners*, 56 Minn. 513.

City and County of San Francisco v. LeRoy, 138 U. S. 656, 672:

> "The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation: To render lands tide-lands, which the State by virtue of her sovereignty could

> claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied."

To the same effect are *Shively v. Bowlby*, 152 U. S. 1, 58, and *Knight v. United Land Assn.*, 142 U. S. at pages 186 and 215.

So far as we can ascertain, there are no previous Federal decisions which adopt mean high tide line as the boundary in preference to the physical high water mark. The foregoing Federal authorities are controlling precedents; they have established a rule of property upon which litigants are entitled to rely and from which courts cannot lawfully depart.

THE COURT ERRED IN REJECTING NEAP TIDES AS THE CRITERION FOR ORDINARY HIGH WATER MARK.

This "ordinary high water mark" has been, both before and since enactment of Civil Code section 830 in 1872, defined by the California courts as referring to the line of the neap tides. In *Teschemacher v. Thompson*, 18 Cal. 11, 21 (decided 1861), the court said:

> "The limit of the monthly Spring tides is, in one sense, the usual high water mark; for, as often as those tides occur, to that limit the flow extends. *But it is not the limit to which we refer when we speak of 'usual' or 'ordinary' high water mark. By that designation we mean the limit reached by the neap tides; that is, those tides which happen between the full and change of the moon, twice in every twenty-four hours.*"

Neap tides are defined as follows in Special Publication No. 135, "Tidal Datum Planes," at page 3:

> "When the moon is in its first and third quarters, the tidal forces of sun and moon are opposed and the tide does not rise as high nor fall as low as on the average. At such times the tides are called 'neap tides' and the range of the tide then is known as the 'neap range'."

(This is the publication which the witness Leypoldt stated to be "a recognized work throughout the country and one that is considered authoritative in its line." [R. 405.])

The criterion stated by Mr. Justice Field in the *Teschemacher* case has been rejected by the Circuit Court largely because it is considered "merely a rough statement of a rule which must be more accurately defined in fixing a definite line of demarcation." [R. 728.]

Neap Rule Established as Common Law.

The court says that the neap tides "would not establish any definite or fixed boundary" [R. 727]. But the California Supreme Court holds *contra*. In *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 313, complaint was made of a judgment quieting title to "ordinary high water mark" upon the ground that it was uncertain, concerning which the court said: "Ordinary high-water mark is the limit reached by the neap or twice-a-day tides * * * and is readily ascertainable at any given time. Under section 3538 of the Civil Code that is certain which can be made certain."

The rule stated by Judge Field in the *Teschemacher* case is, as shown by his cited treatises, one which came to us as a part of the common law. It is not to be brushed lightly aside. *Shively v. Bowlby*, 152 U. S. 1, 14:

> "The common law of England upon this subject, *at the time of the emigration of our ancestors*, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States."

The Teschemacher rule was sanctioned and applied by this court in *United States v. Pacheco*, 2 Wall. 587 (decided in 1865). See also:

> *Coburn v. San Mateo County*, 75 Fed. 520, at 529 (C. C. N. D. Cal.).

STATE NEAP RULE BINDING ON FEDERAL COURTS.

Turning to the state law we find that section 670 California Civil Code says: "The state is the owner of all land below tidewater, and below ordinary high-water mark, bordering upon tide-water within the state * * *." Section 830 C. C. provides that, in the absence of an expressed contrary intent, "the owner of the upland, when it borders on tidewater, takes to ordinary high water mark"; this section, as originally enacted in 1872, said: "When land borders upon tidewater, or upon water which constitutes an exterior boundary of the state, the owner of the upland takes to high-water mark * * *."

These statutes embody a "doctrine" which "is believed to be but a declaration of the law on this subject as it

has existed since the formation of our state government' (*Wright v. Seymour*, 69 Cal. at 127). They are an unmistakable declaration of the sovereign that it claims title only as high as the "high water mark" or "ordinary high water mark". And *the decisions have uniformly defined this mark to be that delineated by the neaps.* The language of Justice Field in the *Teschemacher* case may have been *dictum*, but that is not true of the later California decisions.

Ward v. Mulford, 32 Cal. 365, 370;
People v. Morrill, 26 Cal. 336, 353;
F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 442;
Eichelberger v. Mills Land, etc. Co., 9 Cal. App. 628, 639;
Forgeus v. County of Santa Cruz, 24 Cal. App. 193, 194-5;
Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 23;
Otey v. Carmel Sanitary Dist., 219 Cal. 310, 313.

In those cases the question of ownership was directly presented and determined according to the location of the line of the neap tides.

The case of *Shively v. Bowlby, supra*, definitely adjudicated that the rights of the states in navigable waters extend up to ordinary high water mark; but it also recognized, as do *Barney v. Keokuk*, 94 U. S. 324, 339, and similar cases, that "If they (the respective states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Even if it could otherwise be

said that the ordinary high water mark is properly defined by the mean high tide line, these California statutes and decisions could have *no less effect than a relinquishment by the state of California of all its rights above the line of the neap tides.*

In other words, if ordinary high water mark is not to be determined as a Federal question and by the physical marks on the ground, then the matter becomes one of state law and Federal courts are bound by the state rulings under the familiar doctrine pertaining to state decisions involving title to property and those construing local statutes.

Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63;

Shore v. Shell Petroleum Corporation, 60 Fed. (2d) 1, 3 (10th C. C. A.);

Welch v. First Trust & Savings Bank, 15 Fed. (2d) 184, 187 (8th C. C. A.);

United States v. Title Insurance and Trust Co., 265 U. S. 472, 486.

WHY SPRING TIDES PROPERLY EXCLUDED.

The authorities upon which the Teschemacher decision rests furnish a complete answer to the suggestion that "There is no inherent reason why the highest tide nearest to the full and new moon should be excluded from the average" [R. 728]; for those tides do not render the land uncultivable. Indeed, those tides are the ones which

make swamp and overflowed lands—always recognized as belonging to the upland (see *People v. Morrill*, 26 Cal. 336, 354-6; *Irwin v. San Francisco Savings Union*, 28 Fed. 708, 712; *Miller v. Tobin*, 18 Fed. 609, 614.)

Neaps Can Be Averaged as Well as All Highs.

Even if engineering exactitude be essential in this matter, the neap tides can be averaged as easily as all the highs. They undoubtedly furnish the legal criterion heretofore established and recognized in this country, or, at least, in California. *Their mean elevation is concededly eight-tenths of a foot less than that of the mean of all the highs* [see R. 334] and the substitution of the latter standard for that heretofore adopted by the decisions *might switch the title to the whole of the demanded premises;* for the purpose of the opinion the court conceded the correctness of our statement that "the lowering or raising by one-tenth of a foot may result in the gain or loss of acres, and there are only seven acres here involved" [R. 724]. Should this result, it would mean that petitioners have lost title because, without any Federal or California precedent, the Circuit Court has decided, 85 years after vesting of title, that a theoretical boundary line should control instead of the one established by decision and usage at the time of original vesting in 1850 and at the time of the survey in 1880.

San Pedro Railroad Case Not Controlling.

The *San Pedro* case, 182 Cal. 652, is not opposed to our position for the reason that the trial court there found as a fact the identity of ordinary high water mark and mean high tide line, which finding was not attacked by either party and formed the basis upon which the Supreme Court must necessarily assume that line to be the true boundary. The Supreme Court did not *decide* that mean high tide line is the legal boundary or that ordinary high water mark is not the line of demarcation or that it is not governed by the line of the neap tides This is conceded at R: 724.

Attorney General v. Chambers Distinguished.

Attorney General v. Chambers, 4 DeG. M. & G. 206, 43 Eng. Reprint 486, is not a controlling authority. It was decided in 1854. Our common law on the subject was fixed at the time of independence. The *Chambers* case at best represents a later evolution of the English common law. Had ours not crystallized in a different direction, the *Chambers* decision might be persuasive; but, in view of the definite growth in this country of the doctrine that the neap tides define ordinary high water mark, the *Chambers* decision must be recognized as inconsistent with that rule and can stand on no higher plane than a persuasive argument of unsoundness of the neap rule. But, as we have shown, the court was not free to depart from that rule at this late date merely because it questioned its inherent correctness.

POINT IV.

The Circuit Court of Appeals Erred in Holding That There Is a Substantial Difference, in a Quiet Title (or Ejectment) Action, Between a Denial of Plaintiff's Title and a Counterclaim Asserting Defendants' Title, and in Holding That a Judgment for Defendant Upon That Issue Can Be Reversed Without an Examination of the Sufficiency of Plaintiff's Proofs.

(Specification of Error No. 5.)

The Finding Against Respondent's Title Is Conclusive.

It is conceded that petitioners "denied title in the City and alleged that the lands were not tide lands." [R. 715.] These denials appear at R. 34-36. The counterclaim [R. 44-49] alleges with somewhat greater particularity the same matters which are included in the denials of the answer. [R. 37, 41, 43.] The findings specifically relate to and pass upon "the issues raised by the complaint and denials of the answer." [R. 165.] They expressly find against plaintiff's claims of title. [R. 174-5.] The judgment dismisses the bill of complaint upon the merits and with prejudice [R. 179] and decrees that the demanded premises are not and never were tidelands. [R. 184.] These things appear in addition to the rulings with respect to the counterclaim.

The decision grants a new trial to respondent regardless of the claim that it failed to allege a cause of action or to prove the allegations made by it. In other words, it is definitely held that because of the court's view that the patent is not conclusive, the plaintiff (as appellant) is

entitled to a new trial *notwithstanding the fact that it wholly failed to prove by competent evidence that it possessed good title to the demanded premises.*

And this was done in the face of admissions of plaintiff's counsel, which, in effect, rendered the counterclaim entirely unnecessary.

> "We do not dispute the fact but what the borax people have title to that land by means of conveyance from the original patentee. In other words, we think they will be able to establish that without any question of a doubt." [R. 212.]
>
> "Mr. Butts: I will say this, that *if the City does not own this land, then we don't make any contention that the Borax Company does not own it.*" [R. 637.]
>
> "The Court: You are *not making any question of the title, if it is not in the City?*
>
> Mr. Butts: *No,* Your Hono [R. 689.]

It is manifest that the defendant was not required to produce any affirmative evidence unless or until the plaintiff made a case; and that if the patent be not conclusive in defendant's favor the plaintiff is still not entitled to prevail unless its proof be found legally competent and of probative force sufficient to overthrow the trial judge's finding—which must be presumed to have been based in part upon the *prima facie* effect of the patent, the admissions of the plaintiff, and the inherent weakness of the plaintiff's proofs. See authorities at p. 134, *infra*, to the effect that erroneous reasoning of the trial judge does not impair the force of his findings nor impinge upon the rule (page 133, *infra*) that such findings will stand "unless clearly wrong".

Counterclaim Was Legal Equivalent of Denials.

That portion of the decree which expressly quiets defendants' title is but surplusage, for the adjudication of the insufficiency of plaintiff's title constitutes a conclusive estoppel between the parties in all future litigation. In other words, the negative and the affirmative portions of this particular judgment are, in legal effect, one and the same; they say that the plaintiff has no title.

This is the rule both in the Federal Courts and in the state of California.

Hines v. Martin, 286 Fed. 653, 656 (5th C. C. A.);

Milwaukee & Minnesota R. Co. v. Milwaukee & St. Paul R. Co., 6 Wall. 742, 747 (last paragraph of opinion);

Sunset Tel. & Tel. Co. v. City of Eureka, 122 Fed. 960 (C. C. N. D. Cal.);

Miller & Lux v. Rickey, 146 Fed. 574, 577, 579 (C. C. Nev.; affirmed in 152 Fed. 11, 17, and in 218 U. S. 258).

United Land Assn. v. Pacific Imp. Co., 139 Cal. 370, presented a conflict between a tideland deed and a title derived under the San Francisco Pueblo grant; the authority of the *Knight* case was recognized and followed. Concerning the point now under consideration, the court said at page 378:

> "* * * we are yet of the opinion that in a suit to quiet title, as in other suits, *a denial of the allegations of the complaint is a sufficient answer, and a finding upon the issues thus raised, if adverse to the plaintiffs, a sufficient finding.*"

This case was affirmed in 208 U. S. 614, on the authority of the Knight and Leroy decisions, *supra*.

To the same effect, see:

Larkin v. Superior Court, 171 Cal. 719, 725;
Wilson v. Madison, 55 Cal. 5, 8;
Pennie v. Hildreth, 81 Cal. 127, 131-2;
San Jose, etc. Co. v. San Jose Ranch Co., 129 Cal. 673;
Miller v. Luco, 80 Cal. 257, 261;
Booth v. Stow, 38 Cal. App. 191, 192.

Even if erroneous, a judgment based upon the counterclaim would be immaterial, because innocuous. This is held in

Warden v. Stoll, 210 Cal. 374, 376-7.

The ruling at bar is a reflection of old procedural holdings to the effect that a defendant in a Federal equity cause cannot have affirmative relief unless he pleads and proves a cross bill. But even if that rule were applicable, it could only result in the reversal of the affirmative part of the decree while leaving in full effect the negation of the plaintiff's title.

Wood v. Collins, 60 Fed. 139 (5th C. C. A.).

Rule in Ejectment Cases.

Turning to the ejectment cases, we find the rule to be the same.

Hardin v. Jordan, 140 U. S. 371, 379;
Mitchell v. Smale, 140 U. S. 406, 416 (dissenting opinion);
West v. East Coast Cedar Co., 113 Fed. 737, 740 (C. C. A. 4);
United States v. Pennsylvania & Lake Erie Dock Co., 272 Fed. 839, 842 (C. C. A. 6);
Hockett v. Alston, 110 Fed. 910 (C. C. A. 8).

POINT V.

The Circuit Court of Appeals Erred in Declining to Hold That Respondent Failed to Prove a Case According to Its Own Theory of Law.

(Specification of Error No. 6.)

Certiorari having been granted, the entire record "is before this court with power to review the action of the Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the District Court" (*Story Parchment Co. v. Paterson P. Paper Co.*, 282 U. S. 555, 567; *Langnes v. Green*, 282 U. S. 431, 437-9; *Delk v. St. L. & S. F. R. Co.*, 220 U. S. 580, 588); and, the point having been properly saved by petitioners in the trial court and urged upon the Circuit Court of Appeals [as appears from R. 723], the merits of petitioner's contention "must be examined." (*Camp v. Gress*, 250 U. S. 308, 318.)

RESPONDENT WHOLLY FAILED TO PROVE A CASE ACCORDING TO ITS OWN THEORY.

Plaintiff's proofs were fatally deficient in the following respects:

(a) The evidence shows conclusively that mean high tide line is 4.7 feet, not 5.1 feet, above the plane of mean lower low water, and plaintiff offered no evidence whatever of the location of the 4.7 contour.

(b) Plaintiff introduced no evidence to the effect that the demanded premises were below the line of the mean high tide at the time of the tideland grant of May 1, 1911.

(c) There is no showing of the location of the ordinary high water mark as defined by the neap tides or that the disputed area was ever below that elevation.

(d) It affirmatively appears from plaintiff's evidence that all its elevations are erroneous because of misapplication of the 1875 datum plane to later changed conditions.

ELEVATION OF MEAN HIGH TIDE LINE IS 4.7 FEET.

(a) Mean high-tide line at Los Angeles Harbor is at elevation 4.7 feet above the datum plane of mean lower low water, not 5.1 feet.

Mr. Hughes, although originally an advocate of 5.8 [R. 339], at the trial asserted mean high tide to be at an elevation of 5.1 [R. 330]; then he said: "that he has been informed that the United States Coast and Geodetic Survey had *established and published recently the elevation of 4.7 feet as the elevation of mean high tide* above the datum plane of lower low water; that it had established to its own satisfaction that the elevation is 4.7 feet and not 5.1 feet above this datum plane at the present time" [R. 342]; he also admitted the authoritative nature of the Survey's determinations [R. 342].

Leypoldt said: "that he knows that the elevation of the mean high tide as established by the Coast & Geodetic Survey as of this date for Los Angeles Harbor at the same place where he found his 5.1 is 4.7 feet above mean lower low water." [R. 401.] Having conceded [R. 404] that the work of the Coast and Geodetic Survey is authoritative, he nevertheless took the position that its computations were wrong, and that the true mean was 5.1 [R. 401], which position was exploded by a brief examination by the court, found at R. 405.

This was supplemented by the report of the Chief of the Division of Tides and Currents, which, at R. 396, shows the mean range at Los Angeles to be 3.76 feet, to which must be added approximately 1 foot because of use of mean *lower* low as the datum plane for the Pacific Coast.. (See page 180, *infra.*)

Special Publication No. 135, at page 114, says:

> "For any day the difference between low water and lower low water is known as the diurnal low-water inequality, which in abbreviated form is written DLQ."

Reference to page 23 of the Book of Exhibits shows that the present value of DLQ is 0.95. This, added to 3.76, gives 4.71, the conceded elevation of mean high tide as now authoritatively established by the Coast and Geodetic.

The evidence is absolutely silent as to what land is bounded by the 4.7 contour. Certain it is that it includes substantially more land than the 5.1 contour. But not a witness has attempted to say how much more, nor attempted to delineate by map or otherwise the confines of a parcel outlined by the 4.7. Moreover, not a single map offered or introduced by appellant reflects any 4.7 contour.

State Grant to City Included Only Land Then Situated Below Mean High Tide.

(b) The plaintiff's title rests upon the statute of May 1, 1911 (Cal. Stats. 1911, p. 1256). That Act vested in the City of Los Angeles all the state's interest "in and to all tidelands and submerged lands, whether *filled or unfilled,* within the present boundaries of said city, *and situated below the line of mean high tide* of the Pacific Ocean, or of any harbor, estuary, bay or inlet * * *."

Although the complaint alleges that the demanded premises have been at all times below the line of mean high tide and although this 1911 statute obviously confined the grant to lands *then* situated *below* that line, plaintiff made no effort to show that such was the situation of the disputed area at the date of the grant. [See petitioners' contention, at R. 199-200, 325.] On the contrary, it was affirmatively shown that the island had been "reclaimed" as an incident to improvement of navigation in 1909 [Merwin, R. 389]; that this had resulted in an over-burden of 4 to 6 feet above what the City claims to have been the original surface of the parcel purchased from Hancock Banning and leased to the Shell Oil Company [Merwin, R. 388], and inferentially a like burden upon the northerly end of the island. [See Butts, R. 187 and Fitzgerald, R. 375, 382.] The only rational inference is that the premises were, on May 1, 1911, situated substantially *above* the line of the mean high tide. At best, this would place the land in the category of filled tidelands situated above the line of mean high tide. The grant being limited to such land situated below that line, the title would remain in the State of California. And this is not a use or relation suit.

The effect of this statute is a matter of state law and the construction placed thereon by the Supreme Court of California is binding upon this court (*Globe, etc. Co. v. De Tweede, etc.*, 69 Fed. (2d) 418, 423 (9th C. C. A.); *Sanger v. Lukens*, 26 Fed. (2d) 855, 856 (9th C. C. A.).)

The rule of strict construction applies to a grant from the state to a city as well as a grant to an individual (*Oakland v. Oakland Waterfront Co.*, 118 Cal. at 171).

The grant to the City of Los Angeles is in identical terms with a grant to the City of Long Beach which was construed in *Strand Improvement Company v. Long Beach,* 173 Cal. 765, exactly in accord with our present contention.

At page 770 it was said:

> "It must be admitted that the language of the granting act does not have that effect. It purports to be a present grant and to refer to conditions existing in 1911, and it is limited to lands 'situated below the line of mean high tide of the Pacific Ocean.' *This means the line as it was situated at that time.* The land claimed by plaintiff was *then situated above the mean high-tide line and it was, therefore, not included in the grant* to the city from the state. If the city has no title, the judgment that the plaintiff is the owner of the land in fee is not prejudicial to the city. The state alone could complain, if it has any right or interest under the doctrine above referred to, and it is not a party to the action."

No Showing of Location of Line of Neaps.

(c) Mr. Hughes testified that the elevation of the mean of neaps is 4.3 above the datum plane [R. 334], and Mr. Leypoldt that "he is not able to state whether it would be 4.3 feet above the datum plane of mean lower low water." [R. 400.]

As it appears conclusively that the mean high tide line of these gentlemen is four-tenths of a foot too high (5.1-4.7) according to their own datum plane, it follows that their mean of the neaps is that much too high and that its elevation should be 3.9 feet.

The only evidence which has any tendency to apply the mean of the neap tides to Mormon Island is that of Mr. Hughes; and he does not essay to outline the area bounded by the contour of that plane, whether 4.3 or 3.9. He merely undertakes to establish that practically all the island was below water when the tide was at *4.3*.

He testified that in his peregrinations [R. 319] over the island in 1904, 1906 and 1908, the tide was at heights then known to him, but now remembered "approximately" [R. 318]; he does not say how he then ascertained those heights, or by what means he carried them with him; he did claim that with his eye he measured the depth of the water on his leg [R. 337-8] and found the northwesterly portion of the island covered with water when the tide was 5 feet [R. 319]; and he contended that this was likewise shown to be true by the photographs [Plaintiff's Exhibits 10 and 11; Book of Exhibits, pp. 12 and 13]. An inspection of those pictures taken from a distance of a half mile to a mile [R. 341] explains why Mr. Hughes was uncertain of his interpretation when placed under cross-examination [R. 341], and fully justifies the view that counsel for respondent seek to read too much into them, as intimated by the court's remarks at the top of R. 328.

But be that as it may, the fact that low, comparatively level land is substantially covered with water when the *actual* tide is at the level of the *mean* high tide does not argue that the land elevation is below this theoretical plane of mean high tide. This was borne out by the Fitzgerald testimony at R. 378:

> "If you have a 5 foot tide, ordinarily on the shore of the ocean the water would run up very much

above the elevation 5.0; in other words, the natural process of the water itself is to be affected by such things as wind, waves, capillary attraction, etc., so that the actual water will run higher than the exact theoretical elevation of the given contour."

Mr. Hughes does not claim to have *actually measured* the depth of the water on his leg, but merely to have noted whether the land was under water when the tide was at a given elevation [R. 340]. And he is not sure whether he waded around when the tide was at 4 feet or approximately there [R. 337]; neither is he successful in his effort to establish that the land was under water when the tide was 4.3, for "he does not recall how it was that he got his comparison of the land heights with the 4.3 elevation; that he remembers his conclusion and that is all" [R. 338]. Finally he asserts that the Norway meander corners were "at about half tide level. That would be an elevation of about three feet above the plane of mean lower low water" [R. 329]. When it is recalled that the true mean of the neaps would be 3.9, it would seem to follow that without reference to variation in datum plane, the court would be warranted in finding that the Hughes evidence in this regard was of such uncertain character as to require its being rejected in favor of the definite and official survey.

Surely the time has not come when the title to property worth over a million dollars can be destroyed by testimony of one who, measuring twenty-four years and more after the event and testifying from memory nearly thirty years later, attempts to define elevations to the refinement of a tenth of a foot by recalling, or pretending to recall, the conclusions, not the facts, registered in his mind when he was wading around in the water and guessing at its

depth on his leg, having already guessed at the height of the tide.

It must be remembered that any reasonable inferences deducible from the record and favorable to petitioners' contentions must be drawn in accordance with the familiar rule of review of findings of fact, which accords to them every presumption of correctness and regularity.

HYDROGRAPHIC CHANGES HAVE RENDERED 1875 DATUM PLANE INAPPLICABLE.

(d) All of respondent's elevations—those mentioned by the witnesses as well as those reflected by the maps and other exhibits,—are erroneous because predicated upon a datum plane of the waters of 1875 which, as applied to conditions of 1880, 1899 and subsequent periods, is faulty, —too high,—to an undisclosed and unknown extent.

Respondent cannot escape the fact that the changes made through dredging and deepening of the harbor and straightening the channel between 1871 and 1911, so altered the tidal regime as to render wholly inapplicable to 1899 and later conditions the datum plane upon which all the City's measurements of 5.1 etc. are predicated, for that datum plane was established in 1875.

All these measurements are based upon bench mark "10.07," which was established in 1872 by the Engineer's Department and later adopted by the Coast and Geodetic Survey. [Hughes, R. 336.] All other bench marks in the series mentioned in the testimony were transferred from 10.07. [Hughes, R. 336-337.] The datum plane, which was established in 1875, was that of mean lower low water and it was predicated upon bench mark 10.07;

that same plane of reference has been used continuously since that time. [Hughes, R. 337.]

This same City witness, on direct examination, volunteered the statement that in 1904 "the Government had built an east jetty at San Pedro, *which may have affected the tides.*" [R. 316.] He also testified:

> "Q. By Mr. Butts: Have you ever made a study of the tides in San Pedro Harbor to determine whether or not there was any change in their elevation, say, from 1872 up to 1908, or any other year previous to 1902?
>
> "A. No. What I might have to say on that would be theoretical and speculative. I wouldn't know anything of my own knowledge on that. That I made a study of the Government records in the Engineer's office and those of the Coast and Geodetic Survey for the period from 1902 down to the present time *for the purpose of determining whether there was a change in the elevations* of the tides in San Pedro Harbor." [R. 330.]

Whereupon, counsel for plaintiff hastily dropped the subject, one to which he never returned.

It is alleged [R. 72] and admitted [R. 134] "That the said United States of America at the request of the plaintiff, City of Los Angeles, and for its benefit, did, during said period from September 9th, 1850, to December 30, 1881, and subsequent thereto, do much work and expend large sums of money in dredging and otherwise constructing deep water channels as a part of the creation of a deep water harbor at San Pedro, California, and particularly in and around the said Mormon Island." [R. 72.]

The reports of the Army Engineers for the years 1902-1907, comprising Plaintiff's Exhibit 24, somewhat elaborate the matter:

> "Wilmington Harbor, California.—Wilmington is situated at the head of a small estuary which has its outlet in the bay of San Pedro. * * *. Previous to the commencement of the improvement, in 1871, there was a depth of less than 2 feet of water at low tide at the entrance." [R. 416.]

By 1881 the channel entrance had been deepened to 10 feet at mean low tide [R. 416], and by 1893 this had been increased to 15 feet [R. 416, 417, 426], with the result of "making a straighter and deeper channel." [R. 426.] By 1903 portions of the channel had been dredged to a depth of 18-20 feet. [R. 454, 461.] In 1904 the report said:

> "Dredging to the depth of 21 feet has been done along the greater part of the dock front of San Pedro and East San Pedro, and dredging to the depth of 20 feet is now in progress at the entrance.
>
> Work under the various projects above mentioned has resulted in increasing the depth at the entrance from 2 to slightly more than 18 feet." [R. 476.]

The new processes thus set in motion effected a "scouring of the outer bar" [R. 491], resulting in "a gain of nearly 3 feet over the governing depth at the beginning of the fiscal year" 1904. [R. 491.] In 1905 a depth of 20 feet at the entrance had been obtained. [R. 532, 560.] At this time the condition of the channel was described as follows:

> "The result of this dredging was the formation of a channel 400 feet wide and 20 feet deep alongside

Deadman's Island, and 150 feet wide and 20 feet deep in the channel above Deadman's Island. The dredging along the docks was carried generally to the depth of 20 feet. The governing depth in the outer bar remains about 18 feet." [R. 549.]

It was likewise reported [R. 549] that a depth of 20-24 feet had been obtained in front of certain wharves. The Government dredger San Pedro was placed in commission April 1, 1905, and beginning April 19th worked twenty-four hours a day dredging the inner harbor [R. 560] and in certain places a depth of 24-26 feet had been attained that year. [R. 561.] By 1906 it was reported that the entrance channel had a width of 400 feet and a depth of 21 feet except an area 1000 feet long and 220 feet wide, which had an average depth of 18 feet. The channel inside the entrance had a width of 150 feet and a depth of 20-24 feet in certain places. [R. 576.] In the 1907 report it was stated that between the lower end of the wharves (which are inside the entrance [R. 605]) and Smith's Island (see Exhibit 4 for location) a channel depth of 25 feet had been attained for a distance of about 5000 feet; that in places this had been carried further up the harbor at the same depth and at other places at a 20-foot depth. [R. 608.] The entrance depth had then been dredged at 22.5 feet. [R. 620.]

Throughout these reports run references to a contemplated "turning basin 1600 feet in diameter between the upper end of the wharves and the lower end of Mormon Island to a depth of 24 feet" [R. 427]. In the 1907 report it appeared that a portion of this turning basin had been dredged to a depth of 25 feet and an additional chan-

nel 20 feet in depth carried along the easterly pierhead line for 817 feet, the cuts involved in this work varying from 2.5 feet to 27.5 feet in depth [R. 621].

Subsequent to the work mentioned in these reports was the dredging and filling in the immediate vicinity of Mormon Island in 1909. The witness Merwin, on cross-examination, testified:

> "that there is a channel immediately on the west and on the east of the Island, each of which channels is approximately six hundred feet wide and thirty-five feet deep and the dredging of the channels began in 1909; that as a result of the dredging, two benefits were conferred—by one operation the dredging of the channels, on the one hand, and the filling of the land on the other; that the dredging of 1909 was done in order to enable the closing of the then existing channel at the north end of what we now call Mormon Island Peninsula. It was done to comply with orders of the War Department. The City of Los Angeles dredged the balance of slip No. 1, which is the channel west of Mormon Island." [R. 389.]

And the witness further claimed that the result of this was to deposit on the Shell parcel an over-burden "to a depth of between 4 and 6 feet", with the result that "the present elevation is several feet above mean high tide, whether one takes the figure of 5.1 or the figure 4.7" [R. 388-389]. Inferentially, a like deposit was made over the whole island. Appellant's brief below said: (page 43) "the island was reclaimed and filled and its elevation raised between six and eight feet."

We have already mentioned Mr. Hughes' suggestion of the effect of such improvements upon the tidal regime. The engineer's report for 1903 mentioned as a part of the project "the construction of a dike to divert the water of the Los Angeles River from flowing into the harbor" [R. 452]; this matter doubtless prompted Mr. Hughes' study of the effect of improvements upon the range of the tide, for he worked on this dike matter [R. 314-5] and that may account for the abrupt way in which counsel for plaintiff dropped the subject, at R. 330. By 1904 it had been concluded that "changed conditions have rendered the building of the dike inadvisable" [R. 475], which is explained in the 1904 report (the same one which mentioned the effect of scouring in the outer harbor) as follows:

> "At the time the project was adopted it was believed that the channels in the upper end of the lagoon were being filled to a sensible extent by material brought down by the river when in flood. The *lowering of the low-water plane, due to an increase in the sectional area of the harbor entrance,* will partly account for apparent evidences of fill." [R. 491.]

The necessary result of all this evidence is a conclusion that, as the above mentioned improvements were made in the harbor and its entrance and the tidal prism thereby enlarged, the range of the tide increased; which necessarily means that the plane of mean lower low water was lowered and that of mean high tide was elevated correspondingly. And, *to the extent that the datum plane of mean lower low water was lowered after 1875, the said bench mark which had been established with reference to the waters of 1875 (before large improvements had taken*

place) became too high. For instance, if it be assumed that the range of the tide was increased 1.5 feet, the plane of mean lower low would be lowered approximately .75 feet and the plane of mean high tide would be raised approximately .75 feet. As soon as this had taken place the measuring of elevations from bench mark 10.07 (or any bench mark in the series transferred from 10.07) *would start the measurement .75 feet above the actual plane of mean lower low water and give a correspondingly increased height,*—thus taking from the landowner, according to the City's theory, all land affected by the said error of placing the mean high tide line above its actual elevation.

This is doubtless the purport of the following remarks of Judge Wilbur:

> "We have not dealt with the questions which are discussed in the brief of the appellees concerning the effect upon the tide line of the dredging of the Inner Bay at San Pedro, nor concerning the effect of the freshets. The rule with regard to these matters is too well settled to require a statement thereof in this opinion." [R. 732.]

Judicial Knowledge of Tidal Phenomena.

These considerations will appear more manifest through an exercise of this court's judicial knowledge. It is well established that appellate tribunals take judicial notice of the same matters as trial courts. (6 Cyc. Fed. Proc., sec. 2982, p. 610; 4 C. J., sec. 2367, p. 560.) This includes, of course, the operation and results of natural laws (2 Cyc. Fed. Proc., sec. 576, pp. 840-842; 23 C. J., sec. 1964; p. 140; sec. 1965, p. 142; sec. 1967, p. 145), such

as tidal phenomena. (*Peyroux v. Howard*, 7 Pet. 324, 342; *Lehigh, etc. Co. v. Knickerbocker, etc. Co.*, 212 Fed. 708 (2 C. C. A.); *Muchenberger v. City of Santa Monica*, 206 Cal. at 642.)

We refer to the Leypoldt testimony and the Government publication therein mentioned:

> "that the Coast & Geodetic has made such a careful study of the subject of these tidal phenomena and of tidal ranges and of tidal datum planes, that the Government has published from time to time treatises prepared in the Coast & Geodetic on those subjects, such, for instance, as special publication No. 135 entitled *'Tidal Datum Planes'*; that that is a recognized work throughout the country and one that is considered authoritative in its line." [R. 404-5.]

At page 3 of said publication No. 135 the range of the tide is defined as follows:

> "The difference in height between a high water and a preceding or following low water is known as the 'range of tide' or 'range'. The average difference in the heights of high and low water at any given place is called the mean range."

At page 76, mean high tide is defined:

> "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time."

And at page 108, mean lower low water:

> "The plane of lower water at any point is the average height of all the lower low waters at that point over a considerable period of time."

At page 68, the oscillation of the tide with reference to mean sea level or half tide level is explained thus:

> "The tide oscillates about sea level, high water and low water being the maximum and minimum of the oscillation. And, on the average, the rise of high water above sea level is approximately the same as the fall of low water below sea level. Since half-tide level lies halfway between high water and low water, it follows that it must vary in much the same way as sea level."

The Engineer's reports (Exhibit 24) say repeatedly:

> "Wilmington is situated at the head of a small estuary which has its outlet in the bay of San Pedro, and is 393 nautical miles to the southward of San Francisco.
>
> "Previous to the commencement of the improvement, in 1871, there was a depth of less than 2 feet of water at low tide at the entrance." [R. 416.]

And the report of the preliminary examination of the inner harbor explains that:

> "Formerly all deep-draft vessels lying in the outer anchorage transferred their entire cargoes to lighters, which were towed into the inner harbor; but of recent years many of these vessels have lightered sufficiently to be able to enter and unload at the wharfs." [R. 247-248.]

These facts, coupled with the other evidence of the deepening, widening and straightening of the channel and the enlargement and deepening of the inner basin, afford basis for application of the following passages of special publication No. 135, with the inevitable result that the 1875

datum plane soon became inapplicable. We quote from page 8:

> "In passing over areas of shoal water the tide is affected profoundly; hence sites near the heads of tidal bays and rivers are not suitable for a tide station that is to be representative for any considerable area. In tidal rivers draining large areas the effects of freshets or of the reasonable variation in amount of drainage waters are most pronounced in the upper reaches but become less pronounced further seaward. In the smaller bays and bights, seiche effects are likely to become prominent and such locations are, therefore, in general not suitable for a tide station that is to furnish the data for a region of wide extent."

Page 80:

> "Changes in hydrographic features, whether natural or artificial, likewise may change the relation of high water to sea level, for *such changes* generally do not affect sea level but *do affect the range of the tide.*"

And pages 132-134:

> "If changes take place in the relative elevation of land to sea or in the hydrographic features of the body of water on which the given place is situated, *changes will also take place in the tidal datum planes,* which are fixed by reference to local bench marks.
>
> * * *
>
> "The changes in hydrographic features that bring in their train changes in datum planes are those that affect the local tidal regime. With regard to such changes in hydrographic features, distinction must be made between the open coast and inland bodies of tidal water. While the open coast is at all times

under attack by wave and current and thus subject to change, such changes are relatively slight and only rarely bring about changes in the rise and fall of the tide, even over a period of a number of years. Hence, along the open coast, it may be assumed that tidal datum planes remain constant for periods covering many years.

"*But in inland bodies of tidal water changes in hydrographic features are as a rule followed by changes in the tidal regime, which are reflected by changes in the tidal datum planes.* The changes that may be expected under different conditions will be discussed briefly in this section. But it will be of advantage to consider in this connection the changes in tidal datums that result from changes in relative elevation of land to sea.

* * * * * * * * *

"*It is with regard to inland tidal waters that changes in datum planes due to alteration of hydrographic features become important.* On the open coast it is reasonable to assume that only profound changes in the hydrographic features can bring about changes in the range of the tide. But in inland tidal waters, because of the relatively limited areas and depths involved, changes in the features of considerably lesser magnitude are sufficient to change the range of the tide and thus bring about changes in datums. While the quantitative relations subsisting between changes in the body of water and changes in datums are difficult to establish from general considerations, qualitatively we may determine the changes in the datums that will follow proposed changes in the hydrographic features.

"Tidal rivers are good examples of such inland bodies of water. These rivers serve as highways to

the sea for numerous ports, some of which are situated many miles from the coast. With the increased draft and size of modern vessels, changes in depth or other alterations are frequently found necessary; and such improvements, if of sufficient magnitude, result in *changes in the local tidal datum planes.*

"The tides in rivers are due to the tides sweeping into them from the seas into which they open. Normally the tide travels upstream until stopped by falls or rapids. If the mouth of the river is widened or deepened, this makes for a freer entry of the tide from the open sea and thus for a greater rise and fall of the tide. As a first effect, therefore, of widening or deepening a tidal river at its mouth, we may expect a rise in the high-water datums and *a fall in the low-water datums.* This effect, it is reasonable to expect, will generally be greatest near the mouth of the river, becoming gradually less going upstream.

* * * * * * * * * *

"Widening the mouth of a tidal river increases the cross-sectional area of the channel through which the drainage waters flow into the sea. As a consequence of the enlarged channel the drainage waters have freer outlet, which results in a lowering of the mean sea level some distance upstream. Deepening the mouth has a like effect; in addition, by reducing the friction per unit volume of water it brings about a further lowering of the mean level of the water.

"If as a result of widening and deepening the mouth of a tidal stream the mean sea level at a given point of the river is lowered D feet and the range increased A feet, the changes in the different datums would be: Mean sea level, lowered D feet; mean high water, lowered D – ½ A feet; mean low water,

lowered D+½ A feet. The slope of mean sea level up a tidal stream is relatively slight, but the increase in range of tide consequent upon improvement is relatively large. For example, at Glasgow, on the Clyde, the range was increased 8 feet by river improvements. It follows, therefore, that as a rule in the above formula D is less than ½ A. This means that D – ½ A is negative and that high water, instead of being lowered, is raised somewhat. *Low water, however, is lowered by the full amount of the increase in half range plus the depression of mean sea level.*

"These considerations are important in connection with the improvement of tidal rivers, since the depths in these are generally referred to mean low water. When improvements are contemplated the wording is generally to the effect that a certain depth at mean low water is to be attained. At first thought it would appear that if the desired depth below mean low water is *a* feet and the present depth is *b* feet the channel is to be deepened *a* – *b* feet. But as the considerations outlined above show this is not the case, for the datum plane of mean low water is different in the two cases."

It must be apparent that not only are the City's measurements (whether 4.3, 5.1 or 5.8, and whether made in 1899, 1904, 1906, 1908 or 1909), too high, but that there is a fatal defect in plaintiff's proof, according to its own theory, because the record is devoid of any evidence of the extent to which the inevitable change in the range of the tide had occurred and therefore there is *no ascertainable correction factor which can be applied to the City's measurements.* When an attempt is made to define

the boundaries of flat or nearly flat land, such as here involved, by theoretical elevations and contours refined to the tenth of a foot, *e. g.*, 5.1 feet above mean lower low water, there is no room for application of the maxim *de minimis*. "The lowering or raising by one-tenth of a foot may result in the gain or loss of acres, and there are only seven acres here involved." [R. 724.]

The United States Engineer's reports (Exhibit 24), were introduced in evidence by respondent because of their repeated statement that the average rise of the tide at Los Angeles is 5.1 feet [R. 418, 462, 476, 533, 577, 608]. Appropriate objections were made to their introduction [R. 409], and we now reiterate that the same are incompetent and should therefor be disregarded in determining the sufficiency of plaintiff's evidence; this for the reasons advanced, *infra*, at pages 140-41 and 146-7.

But assuming competency and testing the value of the same, it is apparent that these reports contain internal evidence that the 5.1 foot measurement is erroneous, for no difference in this respect is recognized between the first and last of these reports, 1902 and 1907. They disclose the progressive nature of the hydrographic changes and the fact of their having a direct tendency to affect the tidal regime; indeed, the 1904 report [R. 491] specifically adverted to "the lowering of the low water plane, due to an increase in the sectional area of the harbor entrance." This necessarily discloses an error in the 5.1 elevation,—*an error of unknown extent* and one which plaintiff has not sought to cure or even to define.

Moreover, as shown by the Hughes testimony, these elevations are consistently predicated upon the 1875 datum plane. [R. 336-7.]

POINT VI.

There Is No Substantial Competent Evidence in the Record Which Is Opposed to the Court's Finding [R. 174, 184], That the Demanded Premises Were at No Time Tideland.

(Specification of Error No. 7.)

This discussion naturally presupposes an application of familiar principles governing review of findings based upon conflicting evidence or conflicting inferences from uncontradicted evidence. Respondent's showing is likewise to be tested in the light of the *prima facie* correctness of the Norway Survey (even if it be held not conclusive), and of the specific admissions of respondent, such as those mentioned at page 10, *supra*.

Reference to certain of the applicable and well settled principles of review may not be of out place.

Effect of Findings of Trial Judge.

The findings of the trial court will not be set aside unless manifestly incorrect.

Fidelity-Phoenix Fire Insurance Co. v. Benedict Coal Corp., 64 Fed. (2d) 347, 348 (4th C. C. A.);

Nat. Reserve v. Scudder, 71 Fed. (2d) 884, 888 (9th C. C. A.).

Effect of Reasoning of Lower Court.

And any error in the reasoning of the lower court is immaterial, even if it be carried into the findings. It is

correct result which determines the issue on appeal, not the accuracy of the trial judge's ratiocinations.

McCluer v. Heim-Overly Realty Co., 71 Fed. (2d) 100, 101 (8th C. C. A.);

Stoody v. Mills Alloys, 67 Fed. (2d) 807, 809 (9th C. C. A.).

This principle was recognized in *Indiana Farmer's Guide Pub. Co. v. Prairie F. P. Co.*, 55 S. Ct., 182, 186; 79 L. Ed. Adv. Op. 153, 159:

> "Respondents had opportunity here to show that, although given on untenable grounds, the judgment below is right and should be affirmed. And, if by the record they could so demonstrate, this court, if satisfied beyond doubt that it could do so without prejudice to petitioner, properly might refrain from reversal."

From this it follows that although the trial judge, at R. 161, remarked that

> "The plaintiff introduced evidence from which the conclusion *might* be drawn that the land in question is below the line of ordinary high water mark,"

his findings must be upheld if they be found correct, regardless of his views of the competency of plaintiff's evidence.

Indeed, there is a legal presumption that the trial judge, after filing his memorandum opinion on November 20, 1933 [R. 164] and prior to filing the findings and conclusions on December 8, 1933 [R. 177], disregarded all incompetent evidence (*Elliott v. Gordon*, 70 Fed. (2d) 9, 13 (10th C. C. A.); *Nat. Reserve v. Scudder*, 71 Fed.

(2d) 884, 888 (9th C. C. A.)); and, plaintiff having alleged the demanded premises to be tide land and the burden manifestly resting upon it, failure to sustain the same by competent evidence necessitated a finding of untruth of the allegation (64 *Corpus Juris*, section 1105, p. 1258).

Incompetent Evidence Disregarded on Appeal.

Be that as it may, the rule is well established that in reviewing an equity case, or a law case treated below as one in equity, incompetent evidence must be disregarded.

Engelstad v. Dufresne, 116 Fed. 582, 589 (9th C. C. A.);

Migeon v. Montana etc. Railway Co., 77 Fed. 249, 252 (9th C. C. A.);

Strangio v. Consolidated etc. Co., 66 Fed. (2d) 330, 336 (9th C. C. A.);

Doyle Drygoods Co. v. Lewis, 5 Fed. (2d) 918, 921 (8th C. C. A.).

There is here no necessity of inquiring whether the rule is applicable to incompetent evidence which has been received without objection, for the record affirmatively shows that the contentions hereinafter urged were carefully preserved by appropriate objections of petitioners' counsel at the trial.

With these principles in mind we approach a consideration of the sufficiency of plaintiff's evidence to sustain the allegation that the disputed area was and is tide land,—assuming merely for the purpose of argument that the patent is not conclusive upon the issue.

Smith Map of 1881.

No Foundation Laid.

Most nearly contemporaneous with the Norway survey was the Smith map of January, 1881, Plaintiff's Exhibit 7, found at page 10 of the Book of Exhibits. The record contains no foundation therefor except the testimony of Mr. Easton, who has for thirty-five years had charge of office records and documents in United States district engineer's office at Los Angeles [R. 305]. He said that this map

> "has been on file in the said Engineer's office for many years; that he did not know where it came from; that it was a record in the office of the United States Engineer and that he did not know whether it had been used by the officials of the United States Government in connection with their work in the Engineering Department since the year 1899, but that he knew it was a record in the office of the District Engineer and that it had been in the office to his personal knowledge since 1899; that it contained the file number; that he had told all he knew about said map of his own personal knowledge." [R. 305.]

After appropriate objections [R. 305-6], which were overruled, the map was received in evidence and the foregoing constitutes the sum total of foundation therefor or explanation thereof. It is clearly incompetent for the reasons urged, *infra*, in connection with the Turner map, at pages 140-41, 146-7 hereof. For the present we defer that discussion.

Evidentiary Effect of Smith Map.

An examination of the Smith map shows that it supports petitioners' position, not respondent's. It distinguishes, upon its face, between mud flats, sand dunes, grass areas and salt grass areas. The shading of boundaries next the channel indicates pretty clearly that the areas which could be claimed to represent Mormon Island were higher than mere "grass" and at least as high as land which will grow "salt grass." The Mormon Island parcel is represented in exactly the same manner as the parcel adjoining it on the upstream side, which is shown as "salt grass." Webster's International Dictionary defines "salt grass" as follows:

> "Any grass growing naturally in salt meadows or in other alkaline regions, esp. the stiff dioecious grass Distichlis spicata or any of various species of Spartina."

In this connection, see definitions of "salt marsh" at page 157, *infra.*

Plaintiff's witness Hughes obviously considered salt grass the same as glasswort [R. 334-5] and he took the ground that that grass grows as high as 20 feet above the datum plane and down to the neap line but not below [R. 334]. Fitzgerald apparently had the same understanding [R. 377].

The exhibit refers to "same plane of M. L. W. as the soundings in outer harbor," which undoubtedly means the plane of mean lower low as established in 1875. [See Hughes: R. 337.] Referring to the area which could be claimed to be Mormon Island, it appears that a ridge which roughly corresponds with the Turner high water mark as depicted on Plaintiff's Exhibit 5 (and which

Hughes claimed was covered by water when the tide was 5.1 [R. 331]), is shown to be 8 feet above the datum plane and 1 foot "above high water,"—not *mean* high water, but high water. As the Hughes conception of mean high water was 5.1 and of the higher highs 5.8 [R. 334], which incidentally was based upon the prevailing conceptions of army engineers [R. 334] this Smith reference to "1′ above high water" (used in conjunction with elevation 8′) must necessarily have referred to the highest high waters. Assuming "1′ above high water" and "8′" to be equivalents we find in this map direct corroboration of the Norway field notes, which say that the Island " is from three to five feet above ordinary high tide" [R. 685].

No Probative Force in Evidence Equally Susceptible of Opposing Inferences.

As we see it, the exhibit carries no contradictory inferences. The best that can be said for plaintiff is that the evidence was equally susceptible of opposing inferences.

As to the inability of such evidence to support the weight of an affirmative finding see:

Fidelity & Deposit Co. v. Grand National Bank, 69 Fed. (2d) 177, 182-3 (8th C. C. A.);

U. S. v. Barry, 67 Fed. (2d) 763, 765 (6th C. C. A.);

Grand Trunk etc. v. Holstein, 67 Fed. (2d) 780, 782 (6th C. C. A.);

Nichols v. U. S., 68 Fed. (2d) 597, 600 (9th C. C. A.).

Boschke Map of 1883.

Over appropriate objections [R. 306] this document, found at page 11, Book of Exhibits, was received in evidence at Plaintiffs' Exhibit 8 [R. 307].

We do not pause to discuss the fact that foundation is utterly lacking, for the reason that an inspection of the exhibit discloses that it does not touch Mormon Island or its immediate neighborhood. The left-hand of the sheet deals with the neighborhood of Deadman's Island, which was at the harbor entrance. The right-hand of the sheet relates to Smith's Island and the southerly tip of Rattlesnake Island, both of which, as will appear from Plaintiff's Exhibit 6, are quite a substantial distance south of Mormon Island (Terminal Island is the new name for Rattlesnake Island).

The Turner Survey of 1899.

Respondent lays greatest stress upon the Turner map of 1899 (Exhibit 4) and thereby most persuasively illustrates the weakness of its evidence. This map is supposed to show most of petitioners' parcel situated below high water mark in 1899. Respondent's own witnesses, including Turner, joined in swearing that the map itself, the field notes on which it was based, and the final published map (Exhibit 6) were *all erroneous* in certain respects, because infected with initial errors in the field notes themselves.

The circumstance that this Turner map is on file in the United States engineer's office does not make it a public record in the sense that it becomes competent evidence of the facts it purports to reflect; nor does its age.

WHAT ARE PUBLIC RECORDS FOR EVIDENTIARY PURPOSES.

The matter of admissibility of evidence in an equity cause, or one tried as such, is not governed by state statute or decision; it is to be resolved independently by the Federal Courts according to their own standards (see *Wolfle v. U. S.*, 291 U. S. 7, 12).

There being no Federal statute involved, we must approach the matter according to common law principles. And an examination of the authorities will disclose that the controlling principle is this: that those public documents which are compiled or kept for the purpose of preserving information for the benefit of the public and which are accessible to it for the use of its individual members, constitute *prima facie* evidence of the facts therein contained. But the limitations of the rule are as important as its general statement. It is well established that public records are evidence of only those matters which official duty requires to be recorded; that entries or statements made in the course of or as a result of incidental or collateral inquiries of public officers are not within the rule and that preliminary studies or drafts by public officials which are not carried into and made the basis of official action are likewise not official records within the purview of the rule. The general principles are well stated in *Commonwealth of Massachusetts v. Slavski*, 245 Mass. 405, 417, and *Steiner v. McMillan*, 59 Mont. 30, 36.

That reports of preliminary work of engineers and similar public officials, and the maps and entries made in the course thereof, are not admissible as public records is recognized by the following cases:

Coldwell v. Board of Public Works, 187 Cal. 510, 519;

People v. Klumpke, 41 Cal. 263;

To the effect that *ex parte* statements of surveyors, though acting in the interest of the public, as to boundaries are not competent evidence, see *Payne v. English*, 79 Cal. 540, 543, and *Marcone v. Dowell*, 178 Cal. 396, 405.

The rule of inadmissibility of entries made in the course of incidental or collateral inquiries, or reports thereof, is established by:

Hegler v. Faulkner, 153 U. S. 109, 117-18;

Norton v. Larney, 266 U. S. 511, 517;

Wetmore v. United States, 10 Peters 647, 651;

Laird v. Boston & Maine Railroad, 80 N. H. 58, 59;

Ellicott v. Pearl, 1 McLean's Rep. 206, 212 (C. C. Ky.).

It is likewise of the essence of a "public record" admissible in evidence that it be one intended to be open to the general use of the public and actually so open.

United States v. Elder, 232 Fed. 267 (D. C. Ky.);

Mercer v. Denne, L. R., 2 Ch. Div. (1904), 534, 541;

Mushet v. Dept. Public Service, 35 Cal. App. 630, 634-635.

And the presumption of performance of official duties cannot be used as a substitute for proof of a definite and material fact.

22 *C. J.*, sec. 69, p. 135;

U. S. v. Ross, 92 U. S. 281, 284;

U. S. v. Carr, 132 U. S. 644, 653-4;

Sabariego v. Maverick, 124 U. S. 261;

Marcome v. Dowell, 178 Cal. 396, 405-6.

PURPOSE AND SCOPE OF TURNER SURVEY.

The Turner survey was essentially a preliminary work (and objections thereto were placed, in part, upon that ground [R. 231-2]). It was made pursuant to the Act of March 3, 1899 (30 Stats. p. 1121), which in sec. 22 provided as follows:

> "Sec. 22. That the Secretary of War is hereby directed to cause preliminary examinations or surveys to be made at the localities named in this section as hereinafter provided. In all cases a preliminary examination shall first be made, which shall embrace information concerning the commercial importance, present and prospective, of the river or harbor mentioned, and a report as to the *advisability of its improvement.* Whenever such preliminary examination has been made, in case such improvement is not deemed advisable, no further action shall be taken thereon without the direction of Congress; but in case the report has been or shall be to the effect that such river or harbor is *worthy of improvement,* the Secretary of War is hereby directed, at his discretion, to *cause surveys to be made and the cost* of improving such river or harbor to be *estimated and to be reported to Congress,* to wit:
>
> California.
>
> Inner Harbor, San Pedro. * * *."

A Preliminary Inquiry.

Plaintiff's Exhibit 6 [R. 240 *et seq.*] discloses that the Turner work was one of the surveys authorized by the Secretary of War pursuant to the clause "to cause surveys to be made and the cost of improving such river or harbor to be estimated and to be reported to Congress." The

objectives which Mr. Turner had in mind under his instructions were thus stated by him:

> "that the survey of Mormon Island was made for the purpose of delineating natural conditions upon which to make certain river and harbor improvements; * * * Most of the work was sounding work." [R. 228.]

> "That his survey and investigation of the inner harbor was made with respect to proposed harbor improvements; that he was *not interested in determining property boundary lines.*" [R. 284.]

> "that his primary object in his survey was for the purpose of making soundings throughout the whole of the inner harbor; * * * that although he used exact technical heights for soundings and referred to the said datum plane of mean lower low water, when he came to his land survey he did not attempt to follow that system." [R. 285.]

As a matter of fact, he was not only not seeking to establish boundary lines but actually had a complete misconception thereof. This appears from his written report, which at R. 278 says:

> "The difficulties in the way of this ulterior project are not physical but legal, *due to private ownership of the tide lands down to low-water mark,* and to the existence of the railroad embankment."

The map made under the immediate supervision of Turner is Exhibit 4, whose preliminary nature is established by the conceded facts that a later map, based directly upon the Turner notes [R. 231], was made by one Moran [R. 231]; that the Moran map, not the Turner, is the one which went to Washington [R. 230-1] and that Tur-

ner at no time did any work upon the latter [R. 231]. It thus appears that Exhibit 4 completely dropped out of the chain of official communications and there is no showing of how closely the Moran map coincided with the Turner plotting except through a comparison of the final published map, Exhibit 6, with the Turner sheet, Exhibit 4; comparison of the same will show certain important differences.

The contrast in the legends of the two maps is somewhat significant in this connection as emphasizing the real purpose of the survey. The published map, Exhibit 6, designates the survey as one "showing proposed improvements in the inner harbor." Examination of the document discloses that it clearly outlines an area of proposed improvement which does not appear upon Exhibit 4 and that the improvement stops considerably below Mormon Island, thus making any data pertaining thereto incidental and collateral in the strictest sense. Moreover, while the preliminary map, Exhibit 4, speaks of "high water line" and "edge of salt marsh" in its legend, Exhibit 6 refers merely to "high water" and "low water," thus showing that it was not high water mark in the boundary sense which interested the Chief of Engineers, but actually the difference between high water and low water, the plain inference being that it was the extreme range of the tide rather than the mean range which was of immediate concern. Following this same viewpoint the "edge of salt marsh" outlined on Exhibit 4 was eliminated in the preparation of Exhibit 6, the area being generally indicated thereon without any attempt to define boundaries.

Moreover, there is no showing that either the Turner or the Moran map was ever made the basis of official action; possibly it was Moran's map that was included in

the report to Congress showing the result of the survey made for the purpose of enabling it to consider the estimated cost and to take such action as might be thereafter determined by it. There is no showing that such action was taken; that is to say, that it was based upon or followed the recommendations of the Turner report.

Turner "High Water Mark" Merely Incidental.

The ascertainment by Turner of the high water mark was manifestly an *incidental* and *collateral* question whose determination made in this *ex parte* and casual way could not be conclusive upon the owner of the upland [see objections, R. 239], who was neither a party to the proceeding nor had any right to participate therein [see *Payne v. English, supra*). The manner in which Turner endeavored to establish the high water mark, as hereafter pointed out, emphasizes the soundness of this proposition.

Turner Notes and Maps Not Open to Public.

Certainly the facts, or alleged facts, incorporated in the Turner report or in the Turner map were not compiled or required to be kept for the use of the general public, nor is there any showing that the map, Exhibit 4, or the field notes were ever available for inspection or use of the public. Indeed, it affirmatively appears that the field notes of the soundings (considered by Turner to be the important phase of his work) have been destroyed [R. 298-9]—presumably by Mr. Hughes, who "has used his own judgment from time to time as to what old records should be destroyed in the Los Angeles office of the United States Engineers" [R. 343], and whose process seems to have been merely to preserve only that "which *I* consider of sufficient accuracy and importance for future [illegible]" and not "likely" to "mislead another man." [R. 307.]

EFFECT OF "ANCIENT DOCUMENTS."

The "ancient document" rule is of no avail [see objection, R. 306]. 22 *Corpus Juris.*, sec. 1165, p. 946:

> "The fact that an instrument is an ancient document does not, however, affect its admissibility in evidence further than to dispense with proof of its genuineness where it is otherwise admissible."

King v. Watkins, 98 Fed. 913, 917 (reversed on other grounds in 118 Fed. 524):

> "First. Because it is an ancient document. The doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more admissible on that ground than if it were a newly-executed instrument. Greenl. Ev. Secs. 21, 142, 144, 576."

See, also:

Gwin v. Calegaris, 139 Cal. 384, 388.
Butterfield v. Miller, 195 Fed. 200 (6th C. C. A.).

NO FOUNDATION FOR TURNER SURVEY OR MAP.

Valid objections to the Turner survey and maps were brushed aside [R. 221, 228-9; 231-3; 239; 284].

These documents were not used for mere purpose of illustration of oral testimony; they were offered and received as independent evidence of their contents. Affirmative proof of their accuracy was a *sine qua non* to their admissibility as evidence.

Daggett v. Yreka Mining Co., 149 Cal. 357, 372:

> "A map in itself proves nothing, *unless it is first shown by competent evidence to be a correct representation of the relative positions of the objects it purports to delineate.*"

Johnston v. Jones, 1 Black (66 U. S.) 209. Ejectment to recover a parcel of land formed by accretion on the shore of Lake Michigan. In referring to a certain map from which a witness testified, the court said, on page 225:

> "The facts disclosed in the testimony show that Allen's map itself was not original and reliable evidence. A calculation founded upon it was clearly inadmissible. The admissibility of this evidence, as regards other objections, would depend upon a proper foundation being laid for it."

Young Mines Co. v. Blackburn, 22 Ariz. 199, 207;
Tulo v. O'Gara Coal Co., 183 Ill. App. 423, 429;
Gillespie v. Woodward Iron Co., 209 Ala. 458;
Jacob Tome Institute v. Davis, 87 Md. 591.

The cardinal rule that maps of surveys are competent only when supported by proof of correctness of the field notes and their correspondence therewith (*Scanlan v. San Francisco etc. Ry. Co.*, 128 Cal. 586, 588; *Tebay etc. Co. v. Hastie*, 210 Pac. 605, 607), has been totally ignored herein.

But that does not end the story of the foundation for the Turner map. Respondent's evidence conclusively and without dispute demonstrated the incorrectness of the field notes and of the maps built thereon. Anomalous as it may seem, counsel for respondent, for the purpose of

building up the high water line of the Turner map, industriously proved by his own witnesses that in most respects the map and the underlying field notes were wholly unreliable.

This map, Exhibit 4, must be examined in the light of Exhibit 5, which Hale and Hughes made and which the former initially claimed to be a correct plotting of the Turner field notes [R. 234], but which both conceded to be a combination of the field notes and their individual ideas of corrections that should be made therein [Hale: R. 235-237; Hughes: R. 344-345] plus the injection of Hughes' notion of the physical conditions as seen by him in 1902 or later [R. 346].

The Turner Field Notes.

Referring first to the field notes we find that the objection to lack of foundation was never cured [R. 221-2]. They were recorded by the witness Egbert [R. 220], except one page, the handwriting of which neither he [R. 221, 223], nor Turner [R. 302], could identify. Egbert thought Turner had recorded these notes; the latter thought it Smith, who is living [R. 302] but was not produced at the trial; he, according to Egbert, was not in the field party [R. 226]. Incidentally that page, including as it did the readings from Station 5 [R. 223], referred to one of the vital points of conflict in the notes, to which we shall later refer.

Mr. Egbert at first vouched for the correctness of his recordation of the first 60 observations or "shots" [R. 223], but after being referred to his testimony upon depo-

sition [R. 223-226] he recanted [R. 226] and said that he did not know whether the same were correct or incorrect [R. 227].

"Mr. Ashburn: I would like to go just one step and show you that the Turner notes have *two distinct high water marks,* from 6.5 southwardly.

The Court: That is clear. I understand the testimony on this matter, that is clear." [R. 238.]

This matter is best explained by comparison of the Turner map, Exhibit 4, with Hale's Exhibit 5. The Hale map, as well as the other evidence, shows that from the point marked "3-27" on that map and running southerly through "3-28, 3-29, 3-30, 3-31," and crossing over to and through 1-29, 1-28, 1-27, 1-26, 1-25, 1-24, 1-23, 1-22, 1-21, 1-20, 1-19, 1-18, 1-17, 1-16, 1-15, 1-14, 1-13, 1-12 and 1-11, the survey of the first day of the Turner work found and recorded this to be high water mark; that the survey of the second day located the high water mark beginning at about 6-5 and running through 3-30, 6-6, 3-31, 6-7, 6-8, 6-9, 6-10, 6-11, 6-12, 6-13, 6-14, 6-15, 6-17, 6-18, 6-19, 6-20, 6-21, 6-22, 6-24, 6-25, 6-27, 6-29; that the former, not the latter, was carried into the Turner map, Exhibit 4. [R. 304.] It thus appears that upon one of the cardinal features of the survey there is *an irreconcilable conflict in the notes,* which was at the time resolved by Turner (Exhibit 4) and by Moran (Exhibit 6) contrary to the interpretation which Hale and Hughes now put upon the notes and in which, indeed, Mr. Turner now concurs. [R. 302.]

Mr. Hale claimed that all of the recorded observations beginning with 1-12 running through 1-29, beginning again at 1-30 and running through 1-42, beginning again

at 1-43 and running through 1-69, are incorrectly re-recorded in the notes. [R. 235-236.] Having developed these matters counsel for petitioners then turned to the northerly end of the island and developed the fact that the witness claimed error at point 4-54. [R. 238.] Oddly enough, that was designated in the notes as "edge of grass" but he and Mr. Hughes here reversed their former process of interpreting "high water mark" to mean "edge of grass" and now call this point "high water mark" in the face of the contrary record of the field notes. At this point counsel's efforts to further develop the weaknesses of the evidence were abruptly halted by the court's summary termination of the cross-examination. [R. 238.]

Mr. Turner, referring to the Hale testimony, conceded error in the notes and offered to theorize as to the manner of their occurrence [R. 283, 290], being unable to do more than that. However, at R. 289 he made the affirmative claim of error in recording the very first observation of the survey, following which were assertions on his part of like errors in both the south and north ends of the island. [R. 291-297.]

> "Q. By Mr. Ashburn: Mr. Turner, do you now concede that there were errors in the recording of those notes? A. Certainly.
>
> Q. And you are not able to tell us definitely and specifically which notes were correct and which ones were incorrect, are you? A. No." [Turner: R. 292-3.]

Referring to the "slough," which Hale on Exhibit 5 shows as running clear across the island and which Turner himself had shown as running but part way across and then curling to the north, a different direction from that

in which Hale carried it, Turner testified that he could not say whether he or Hale had correctly depicted it—"I did not think it was an important matter." [R. 295.]

When he was being questioned concerning Point 4-56 his testimony was thus summarized by the court and himself:

> "Q. By the Court: Other than what was done at the time, you don't know any more about it than myself or counsel, is that about it? A. That is about the size of it." [Turner; R. 297.]

Again at page 303 he testified:

> "But when you see the point marked high water mark, and edge of grass, then when you see another point marked edge of grass and high water mark, which cannot be reconciled to the other position—
>
> The Court: In other words, there are some apparent contradictions in it? A. Yes, sir.
>
> * * * * * * * * *
>
> By Mr. Butts: The *conflict is in the notes,* isn't it, Mr. Turner, in the field notes? A. *Yes.* One point will be marked high water mark and another point marked high water mark and *they cannot be reconciled."*

Mr. Hughes, on both direct and cross-examination, asserted that Turner had included too much land within his high water mark. [R. 331, 332, 343, 344.] Numerous errors and inconsistencies were specified by him at R. 344-5, he having admitted that in one place he and Hale in preparing Exhibit 5 "discarded about 50 or 60 of the Turner notes relating to high water mark." [R. 344.]

Errors Carried Into Maps.

We have, then, an undisputed showing of erroneous field notes, which in turn have been variously interpreted—the official version being unanimously claimed to be incorrect. This should completely destroy the competency and effect of the Turner survey, for at best an official record is but *prima facie* evidence. Certainly it cannot stand in the face of the affirmative evidence of those who compiled it to the effect that the work was not correctly done—especially as that evidence was elicited by the party who offered the exhibit and upon whom the burden of establishing its accuracy rested.

Johnson v. Jones, 1 Black (66 U. S.) 209, 225.

And it must be always remembered that these same errors permeated the undisclosed Moran map [R. 231] and the published map, Exhibit 6, which was built thereon.

> "Q. In other words, if an error or series of errors was carried into this Exhibit 4 of Mr. Turner's, it has *also been carried into the published map, isn't that right?* A. *Yes.*
>
> Q. Your claim is that *both the Turner maps, Exhibit 4, and the published map, Exhibit 6, are incorrect*, and instead of the lines that you find there you should find what is shown on here in the heavy blue lines on Exhibit 5? A. *I do.*" [Hughes: R. 345.]

Exhibit 5 must also fall, for, though it professes to correctly reflect the Turner notes, it contains a queer mixture of forced interpretation by Hughes and Hale and

injection of personal notions of Hughes as to what the survey should have shown. And all this notwithstanding the fact that Hale had no personal knowledge of conditions in 1899 [R. 237] and Hughes claims no personal familiarity prior to 1900 [R. 304, 333] nor any personal knowledge of conditions at the time of the Norway survey in 1880. [R. 333.]

Presumption of Continuity Does Not Run Backward.

This suggests the established rule that the application of this map (even if correctly showing 1899 conditions) to the 1880 situation is not permissible. [Objections on the ground of remoteness were repeatedly made. R. 231, 233, 239, 322-3.] The presumption of continuance of an established condition does not run backward. [This objection at R. 221.] Although plaintiff waived any claim that changes had occurred between 1880 and 1899 [R. 322] defendant made it clear that it did not concede such to be the case. [R. 323.] This is where the matter was left; no effort was made to prove plaintiff's assertion. See

W. F. Corbin & Co. v. United States, 181 Fed. 296, 304 (6th C. C. A.);

Sandiford v. Town of Hempstead, 97 N. Y. App. Div. 163, 173-4 (affirmed 186 N. Y. 554, 79 N. E. 1115);

Windhaus v. Bootz, 92 Cal. 617, 621;

Cerruti Merc. Co. v. Simi Land Co., 171 Cal. 254, 256;

In re Dolbeer, 149 Cal. 227, 235.

EVIDENTIARY WEIGHT OF TURNER MAP.

But if it were conceded to be competent, the weight of the Turner map would be nil. The method of survey which is disclosed by the evidence shows that it was not the sort that could be used to destroy an official survey made twenty-nine years previously for the specific purpose of ascertaining and establishing the boundary, or to destroy title based upon such official action of the Land Department.

Primarily Turner's was a hydrographic survey; soundings were his main objective. [R. 228, 285.] They were based upon spirit leveling, which rested upon the 1875 datum plane above mentioned. [R. 285.] These soundings were not made contemporaneously with the topographic work [R. 298] and their juxtaposition in a few places with the outlines of the land does not have the significance attached to it by plaintiff, being more a matter of coincidence than an attempt to fix land elevations. [R. 285, 298.]

But the method of making the topographic survey was quite different from that of making soundings. There were no elevations taken for Turner's assumed high water mark [R. 285] or for his "edge of grass" [R. 297]; for the latter he relied upon the rodman, a practical stranger, the quality of whose work he could not vouch for. [R. 298.]

For his starting point of "HWM," or "high water mark," he first picked upon the beach a spot *of unknown elevation* [R. 285] which appeared to him to be typical and which, as counsel for plaintiff expressed it, "he established as *what he thought*, or what he determined to be the high water mark." [R. 233.] But the witness was unable to describe it so that the court could ascertain whether he

actually picked the high water mark or something above it such as the line of drift. Particular attention is invited to his wholly unsuccessful efforts at R. 229, 230, 286, 287, 288. Indeed, he admitted at R. 287 that "it was not intended to be very precise." If the Turner map is to be accepted as evidence of boundary the court must rest upon the conclusion of the witness made in a purely incidental inquiry under circumstances which he cannot reproduce sufficiently to enable the court to determine the evidence upon which the conclusion rested or the correctness or incorrectness of his inferences.

This unknown elevation of a vaguely described spot on the beach the witness endeavored to carry around the island through the use of stadia [R. 230, 233, 226-7], but he does not know where the instrument was initially placed. [R. 228.] When he came to such matters as the slough shown on Exhibit 5 at 4-36 and 4-58 on the east and at 4-11 and 4-10 on the west he took the water width "measured by the eye," at an unknown height of the tide. [R. 297.] Although the closing of a line of levels would have been the accepted method of determining whether the contour had been accurately carried around the island [R. 299] Mr. Turner did not attempt to close. [R. 300.] It seems obvious that he could not have done so for he had two distinct high water marks as the result of the surveys of two successive days. [R. 299.] As above pointed out, one of them, which he carried into his map, is shown on Exhibit 5 as extending approximately from 5-5 through 5-11 and intervening points and from 1-29 through 1-12 and intervening points [R. 344], and another extending approximately from 6-5 through 6-29 and intervening points, the latter being the one which he now declares to be correct [R. 302] but which Mr. Hughes asserts is also wrong. [R. 332, 344-5.]

Concerning the "edge of grass" upon which respondent relies so heavily, not only was its selection entrusted entirely to the unproved rodman [R. 292, 298] but no attempt was made to carry a uniform level or contour around the island [R. 292, 297] for the obvious reason that the *edge of grass is not at a uniform elevation* [R. 297]; "the lower limit of growth of long straight grass was not uniform as to elevation and the observations that the witness took with respect to location of edge of grass were not taken with respect to any level at all." [R. 297.] This leaves the level of the "edge of grass" a matter of pure guesswork; and the figures 3.8 and 3.7 purporting to represent the elevation of edge of grass above the datum plane [R. 284] furnish a wholly unreliable criterion for the fixing of property boundary line. Mr. Turner is not even certain who put that line in his map. [R. 302.]

Mr. Turner conceded that all land on the northwesterly portion of the island was higher than the edge of grass [R. 302] to an unknown extent. [R. 300.] In fact, upon his deposition he testified that the highest land of Mormon Island was within that portion marked "Island" on Exhibit 4. [R. 300-301.] And on the trial: "It is a very flat hogback, you might call it; it did gradually rise." [R. 300.]

When it is remembered that the actual and officially determined mean high tide line is 4.7 feet, not 5.1 feet, above the datum plane; that neap tide is the boundary and its mean is 3.9 feet, not 4.3 feet, it must be conceded that the Turner map, taken at par, shows the "edge of grass" to be at the boundary line or so close thereto as to make the difference of only .1 or .2 feet negligible to the point of rejection. And Exhibit 25 shows that this line of "edge of grass" lies largely *outside* the lines of the Government

patent and that practically all of the demanded premises are included *within* the confines of Turner's "edge of grass"; and this is true even after Hale and Hughes have forced the Turner notes to meet their own purposes, namely, the trial of this case—said Exhibit 5 having been prepared in April, 1929, and Exhibit 25 in February, 1931.

We have shown, *supra,* that the harbor improvements had effected a change in the range of the tide, making inapplicable to conditions of 1899 the datum plane established in 1875, upon which Turner's elevations rested. When correction is made on this account the necessary result is that the land within Turner's "edge of grass" is substantially above the legal boundary.

What Is "Salt Marsh"?

Moreover, his "edge of grass" is shown by the legend of the map, Exhibit 4, to be "edge of salt marsh." Now, that is a common name for a type of land which is above the legal tideland boundary and is technically known as "swamp and overflowed land."

55 Corpus Juris, p. 1347:

> "Salt marsh. A term applied in California to a certain class of "swamp and overflowed lands" held by the state under the "Arkansas Act." ' "

This is fully supported by the case of *Rondell v. Fay,* 32 Cal. 354, 364.

See, also, language of Mr. Justice Field in *Knight* case, 35 L. Ed. at 985, and

People v. Morrill, 26 Cal. 336, 354-356;
State v. Sweet Lake etc. Co., 164 La. 239, 250;
State v. Lake etc. Club, 127 Mich. 580, 601-3.

Turner Took Line of Drift as H. W. M.

This designation of the land as "salt marsh" argues, as did Turner's oral attempts to define his high water mark, that he actually tied into the line of drift, which would necessarily represent the upper limit reached by preceding high waters, it being conceded that the higher highs run considerably beyond the line of mean high tide [R. 342-343] and would naturally leave the drift at the highest point reached. This would account for the new and higher line of mean high tide which Turner found, or thought he found, on the second day of his survey.

> "Q. All right, describe that spot as it then looked. A. Well, it was on the beach and was *about the edge where some little grass drift had lodged.* * * *
>
> Q. And was there any mark in the beach itself, any definite line to which you referred? A. Yes, there was a *line of drift* along there.
>
> Q. But you took a line lower than the line of drift, did you not? A. Oh, yes, but very small, the movement was very little.
>
> Q. So that the *best explanation you can give of the physical mark there was that it was close to the line of drift, is that right?* A. *Yes.*" [Turner, R. 286-7.]

Mr. Hughes testified "that he was taught in the Engineering Corps in the '90s that the high-water mark meant the higher highs; that he had been instructed to use the higher highs as representing high-water mark in connection with building structures and that he had no other instructions with reference to any other type of work." [R. 334.] Why should "high-water mark" not have meant the same thing to Mr. Turner in the '90s? Why should he not have adopted the "higher highs" as evidenced by

the line of drift upon the ground? Mean high tide meant nothing to him, for he thought the property boundary line to be low-water mark. [R. 278.] His only instructions were verbal ones "to establish the high-water mark" and "to limit the edge of the grasses, patches of which grew all about the harbor." [R. 230.] This instruction, emanating from the Corps of Engineers, must have carried to his mind the accepted meaning of the mark made by the higher highs and this in turn would mean the line of drift on the shore.

Harbor Line Map of 1908.

Over appropriate objections [R. 348] the court received as Exhibit 12 the map establishing on July 29, 1908, harbor lines at San Pedro.

Copied From Turner Map.

The document does not purport to reflect an original or independent survey. Indeed, it was stipulated [R. 348] that it was copied from the Turner map so far as outlines were concerned; and an inspection of it will show that its outlines for Mormon Island are exactly those of Exhibit 6.

Hence, the harbor line map is subject to all of the infirmities of the Turner survey and the maps built thereon; it necessarily falls with them.

Effect of Harbor Lines.

Moreover, the establishment of property boundaries was not even an incident to the fixing of harbor lines. They are designed merely to meet the needs of navigation and amount to blanket permits to build up to, but not waterward, of the prescribed lines—solid structures to the bulkhead line and open structures to the pierhead line. [R.

315.] Establishment of harbor lines takes no property, even though they embrace upland.

Prosser v. Northern Pacific Railroad Co., 152 U. S. 59, 65;
Philadelphia Co. v. Stimson, 223 U. S. 605, 623.

It merely evidences an intent to thereafter acquire by condemnation or other lawful method any upland lying waterward of the located line. The exhibit itself bears this out, for both the pierhead and bulkhead lines invade certain portions of Mormon Island, which the exhibit shows to be upland.

Statement of Average Rise of Tides.

The statement of this harbor line map that "The average rise of tides above the plane of reference is 5 1/10 feet" at best creates a conflict, which is resolved in petitioners' favor by the concession that the average rise of the tide or mean high tide has been authoritatively fixed at 4.7 feet, not 5.1 feet. This statement is doubtless predicated upon the annual reports included in Exhibit 24, or upon the same data, and our remarks at page 132, *supra*, are equally applicable thereto.

Referred to Inapplicable Datum.

The exhibit also says "the plane of reference is mean of lower low waters by Coast and Geodetic Survey." This is the same datum plane which, according to undisputed evidence, was based upon bench mark 10.07 or others transferred from it. As we have heretofore shown, that datum plane, because of extensive harbor improvements, had become inapplicable long prior to 1908, thus rendering too high, to an unknown extent, all measurements based thereon.

U. S. Coast and Geodetic Survey of 1859.

The topographic and hydrographic sheets of this survey were received as Exhibits 20 and 21, respectively (found at pages 24 and 25, Book of Exhibits).

Mr. Leypoldt alone attempted to interpret these sheets by saying that the whole island is there shown as marsh land; he apparently thought "marsh land" to be "tideland." He conceded, however, that the symbol used is not the one now in vogue. [R. 398-9.] He arrived at his conclusion by comparison of one portion of the map with another and supplying his alleged knowledge of conditions first known to him sixty-four years after the map was made. The incompetent nature of the testimony appears from this excerpt:

> "That he did not know what the symbol used by the Coast & Geodetic Survey actually meant except from reasoning from other portions of the map." [Leypoldt, R. 400.]

Weight as Evidence.

The outlines of the hydrographic sheet were copied from the topographic survey, Exhibit 20. [R. 400.] It was a plane table survey [R. 399] as to which Leypoldt said:

> "that in making such a survey the surveyor goes on the land, sets up a table and delineates right there what he sees in front of him, while a survey such as Exhibit 5 is interpolated between the respective observation points and the interpolation is made after the survey is completed." [R. 400.]

The field notes of the hydrographic survey were received in evidence as Exhibit 22 [R. 400] but they have not been included in the Book of Exhibits.

This state of the record leaves the map to speak for itself as to its meaning. An inspection discloses that obviously the entire island was not then "marsh land" (even if Leypoldt's deduction as to the symbol or his notion of elevation of "marsh land" were correct). The white area in the north central portion appears to be higher than the hatched portions; we find depicted a small depression running northwesterly through the white area into the waters of the bay, thus showing this white parcel to be higher than the boundary line which divides the island from the waters; and this rivulet apparently originates in the hatched portion which Leypoldt calls marsh and which is likewise situated within and necessarily above the boundary line.

It will be noted that the dotted line indicating low water mark is continuous past the white area and entirely surrounds the portions claimed to be Mormon Island, or the "two tidal isles" of respondent's witnesses. Were the white area not higher than high water mark it would be severed by one or both of the dotted and heavy lines which actually surround it. The only reasonable deduction is that the heavy line surrounding the island is the high water mark, and, as it is continuous, the map conclusively shows the white area to be above that level and indicates the hatched portion to be even higher.

Certainly it leaves no room for respondent's contention that a slough crossed the island and severed it into two distinct islands, for the above mentioned rivulet runs northerly across the section which respondent claims to have been severed by the slough.

The only reasonable inference to be drawn from these two exhibits is that Mormon Island in its entirety was in 1859 situated above high water mark.

The very best that can be said for appellant is that the 1859 survey is susceptible of the Leypoldt construction that the same was "marsh land." That leaves it without evidentiary value for two reasons. In the first place, marsh land lies above high water mark. (See pp. 41, 157, *supra*.) In the second place, evidence which is equally susceptible of opposing inferences has no probative force.

U. S. Coast and Geodetic Survey Chart of 1852.

This document was received as Exhibit 23. [R. 407; Book of Exhibits, p. 26.] No explanation of the same was offered by any witness.

Attempt to Refute Respondent's Own Admissions.

Respondent claimed below that this exhibit shows no upland in the inner bay; this renders it useless to respondent, for it is an attempt to belie the admission of the pleading that there was, on September 9, 1850, and at all times since, an island in the inner bay known as Mormon Island and having at least five acres of upland. [R. 111.]

Meaning and Effect of "Reconnaissance Chart."

But if respondent's interpretation of the chart were correct, it would still have no evidentiary value for the reason that the document is manifestly a "chart," as the certificate of the acting director endorsed thereon designates it and as it is likewise designated at R. 407. The exhibit further shows that it is but a "Reconnaissance of San Pedro Harbor, California"; that the work was dor by a hydrographic party. It further shows upon its face that it was prepared as an aid to mariners. It seems to recognize the fact that vessels could not enter the harbor but must anchor outside and lighter their cargoes over the bar. [R. 247-8.]

The term "chart" is significant. At the time it was made the term referred to a guide for mariners.

> "A half century or more ago the word 'maps' related to representations of land surfaces and 'charts' to water surfaces. The charts were for use by mariners and designed among other things to guide them in their trips in waters to them unfamiliar, or if familiar, to aid them in keeping to a desired or safe course." (*Shieldon v. U. S.*, 4 Ct. Cust. Appls. 42, 46 (1913).)

A "reconnaissance," according to Webster's New International Dictionary, is a "preliminary examination or survey," which in engineering parlance means "an examination of a region as to its general natural features preparatory to triangulation, etc."

The Americana defines the term as follows:

> "* * * Also the preliminary examination of a country in reference to its general natural character, preparatory to a more particular survey for the purposes of triangulation or the construction of public works, as of a road, canal, railway, etc."

It manifestly appears that matters pertaining to the inner bay were of no moment to this hydrographic party for the reason that they had no bearing upon the conduct of mariners who habitually stayed outside the bar. Hence, any land formations in the Wilmington lagoon deserved no attention other than mere sketching, such as they received.

Evidentiary Value of Same.

Again we say that if this exhibit is construed to mean that Mormon Island was marsh land it places it above high water mark. Also that the exhibit, being susceptible of opposing inferences, carries no evidentiary value whatever.

Desserey Survey of 1909.

The evidence concerning this survey includes Exhibits 14, 15 and 16 which were received over appropriate objections of defendant that no proper foundation had been laid therefor. [R. 376, 385.]

No Foundation Laid.

After the commencement of the former tideland suit involving Mormon Island [R. 379-80], which was started on October 19, 1908 [R. 63], and shortly before consolidation of the City of Wilmington with the City of Los Angeles in August, 1909 [R. 379], a survey or partial survey of Mormon Island was made under Mr. Desserey, the then city engineer of Wilmington. It was commenced on July 28, 1909 (see Exhibit 16 at page 17, Book of Exhibits), and mapped in September, 1909 (see Exhibits 14 and 15). It thus appears that the Fitzgerald and Desserey maps, to which reference will be made, were prepared after the consolidation and during the pendency of the above mentioned suit. The survey was made under circumstances which were calculated to produce errors and to indicate that the work was done solely for purposes of the pending lawsuit; at any rate no other purpose is suggested by the record.

In no sense is any one of the above mentioned exhibits shown to be a public record. No foundation whatever is laid for introduction of same as public records. No authority is shown for the making of the survey (see *Rose v. Davis*, 11 Cal. 133, 141); the field notes, Exhibit 16, and the Fitzgerald and Desserey maps, Exhibits 14 and 15, contain no filing marks whatever indicating that they have ever been recorded or that they constitute a part of public records of the City of Los Angeles, or any other

public official. It is not shown whence they were produced nor where they have been during all the intervening years. (See authorities at pages 140-41, 146-7, *supra.*)

Conditions Surrounding Survey.

This survey was made during the progress of the improvement of navigation which was mentioned in the Merwin testimony [R. 389] through which "two benefits were conferred—by one operation the dredging of the channels, on the one hand, and the filling of the land on the other; * * * It was done to comply with orders of the War Department." [R. 389.] Levees, averaging 8 feet in height [R. 384], had been already thrown up on the west side, around the south end and along part of the east side of the island [R. 381] and dredged materials were being deposited upon the island continuously [R. 382]; a suction dredger was at work in the southeasterly channel [R. 382] and it was pumping "certain hydraulic matter" onto the island. [R. 375.] This had progressed to such a point that the original surface of the island was partly obliterated and Fitzgerald (who was in charge of the party—now a member of the Harbor Board of respondent [R. 378] was able to survey "only a portion of the natural island." [R. 376.] The field of operations was being further obscured each hour [R. 382] and by the time that the Fitzgerald party reached that locality:

> "Some of the contours on the northerly end of the island had already been affected by the combined operation of the water and the levee." [Fitzgerald, R. 382.]

and

> "There was water standing there at that time, which might have been water from the dredging operations." [Fitzgerald, R. 381.]

The work was necessarily done "rapidly" [R. 382], so hastily that the initial elevation, upon which all of the Fitzgerald later measurements of 4.3, 5.1, etc., were predicated, was taken by a single observation across the channel from the railroad to the island, a distance of approximately 1000 feet [R. 380]; "the level thus obtained was carried around the island or an *attempt* was made to do so" [R. 380]; but the surveying party "did not, after going around the island, carry the line of levels back to the bench mark where he started." [R. 380.] Fitzgerald contented himself with checking against levels of a certain Colonel Hueur, who was also making a survey of Mormon Island at the time but who is not further identified and the accuracy of whose work is wholly problematical. [R. 380.]

Field Notes Shown to Be Incorrect.

The said exhibits are subject to the basic objection that the field notes not only are not shown to be correct but are actually proved to be unreliable—and this by the evidence of the man who made them.

As to the necessity of affirmative foundational proof that the field notes are correct, see

Scanlan v. San Francisco etc. Ry. Co., 128 Cal. 586, 588;

Rose v. Davis, 11 Cal. 133, 140, 141-2;

Nichols Applied Evidence, Vol. 1, Sec. 86a, p. 827.

10 Cal. Jur., section 178, page 904:

> "Field notes made by a surveyor who does not testify to their correctness, and the correctness of which is not proved by any competent evidence, are properly excluded."

Except in a few particulars, Mr. Fitzgerald, who made the notes, did not purport to have any recollection of the facts reflected thereby, and the matter is left in worse shape than if he had not attempted to authenticate his work. Certain known errors are disclosed; the pursuit of others was abruptly frustrated by a court ruling summarily terminating cross-examination; to what extent the entire set of notes is permeated by error is not disclosed. And affirmative errors in Fitzgerald's own map—inconsistencies between it and the notes—are disclosed, as are also further affirmative departures in the map made by Desserey himself.

Though Mr. Fitzgerald testified on direct that his notes were correct [R. 376] he later confessed certain errors. For instance, it appears at R. 382 that on page 30 of the notes (Book of Exhibits, p. 17) there is a hiatus in one of the contours representing a distance of about 120 feet, which was "just a hiatus in the field notes." [R. 382.] Indeed, the contours throughout "were not drawn exactly to scale; they were sketched in on the ground without depending on the scale." [R. 383.] The 4.3 contour (which was supposed to represent the mean of the neap tides) was done in duplicate. Attention being called to this, the witness made the following confession:

> "Mr. Ashburn: I offer to show by the witness that on page 31 of the notes there are two 4.3 contours on the left-hand side of the page, only one of which is shown on either of the maps which have been produced.
>
> The Court: You mean two different 4.3 contours?
>
> Mr. Ashburn: Yes, sir, and only one of which has been shown on either of the maps.
>
> The Court: Is that correct?

A. It is shown, Your Honor, but the inner one has been scratched out with a pencil mark over it, so, apparently, there was *some mistake.*

The Court: All right.

Q. By Mr. Ashburn: *In the field notes themselves?* A. *Yes, sir.*

The Court: That is enough along that line." [R. 383-4.]

As we have said further pursuit of such fundamental errors was abruptly halted by the trial judge. [R. 383.]

Fitzgerald's Map Unreliable.

Exhibit 14 is a plotting of the field notes made by Fitzgerald himself. [R. 375-6.] The 3-foot contour thereon is confessedly erroneous. [R. 384.]

Likewise the treatment of the slough was faked:

"The slough did pass through the levee but the map showed a closed contour. The contour which shows edge of grass as a continuous line across the end of the slough is incorrect. * * * The slough actually did end against the levee but the natural slough passed under the levee before it was constructed. Scaling the notes it appears that the interval between the levee and the end of the slough is approximately fifteen feet; that that is the slough through which he had said he had traveled in a boat." [R. 384.]

The examination following the above mentioned ruling [R. 383] was necessarily greatly curtailed because of the peremptory nature of the court's instruction.

Desserey's Map Incorrect.

Exhibit 15, the map made by Desserey, not the witness [R. 375], purports to show a 4.8 contour, but according to Fitzgerald:

> "the 4.8 contour is not the natural condition; that the field notes show that this contour is covered by the slope of the levee; that it had been constructed with a clam shell dredge, and the wet material had sloughed down over the elevation where the 4.8 contour is shown; in other words, the 4.8 contour is not an actual contour." [R. 377.]

Likewise:

> "the 4.3 contour line was marked 3.0 at the southerly end, which he stated was an error." [R. 377.]

And the 3.0 contour which appears on the Fitzgerald map is not shown by Desserey at all. [R. 377.] Fitzgerald further said:

> "that page 30 of his field notes shows that at the northerly end of the island where the 4.8 contour and the 5.1 contour are shown, edge of grass runs all around that higher land; that the edge of grass was very close to the 3 foot contour; that in most instances edge of grass was *inside* the 3 foot contour; that this would mean that edge of grass was *higher* than 3 feet; that the plot sheet, Exhibit 14, likewise shows edge of grass inside the 3 foot contour but the other document, Exhibit 15, made under Mr. Desserey's specific directions, departs in that respect and the 3 foot contour was omitted from that map, which merely shows the edge of grass outside the 4.3 contour and the next contour shown is the 2 foot one, no 3 foot contour being shown there at all; *from that map the best that can be said is that edge of grass is*

somewhere between 2 feet and 4.3 feet, while on the witness' plot sheet it is apparent that the edge of grass is somewhere between 3.0 and 4.3 feet. The map as made by the witness shows the edge of grass in and around Mormon Island and that the elevation of the edge of grass was slightly above three feet above the datum plane of mean lower low water." [R. 380-1.]

Though the hiatus of 120 feet appears in the notes, "a straight line was drawn through it when the map was plotted." [R. 382.] Further probing of errors of this particular exhibit was likewise forestalled by the court's attitude.

The net result, even under this restricted cross-examination, was that neither the notes nor the Fitzgerald plotting nor the Desserey map is shown to be correct; that they were affirmatively shown in each instance to be erroneous and to be inconsistent with each other. It would seem to follow that all of them must be totally rejected.

Subject to Same Infirmities as Turner Map.

Moreover, all of the objections of remoteness, and other matters mentioned at pages 146, 153 hereof, are equally applicable to these documents as to the Turner and other surveys above discussed.

The foregoing is the sum total of the documentary evidence received, except such as is incidental to the parol evidence of respective witnesses. Most reliance was placed by respondent upon the testimony of Mr. Hughes.

Review of Testimony of D. E. Hughes.

Hughes, a retired civilian employee of the engineer's office in Los Angeles [R. 304], whose personal knowledge does not antedate the year 1900 [R. 333], was taught in the Engineers' Corps that high water mark meant the *higher* highs [R. 334] or a mean of 5.8 feet above the datum plane [R. 330] and he long *contended* for that elevation as the property boundary line. [R. 339.] He undertook to tell after the lapse of more than twenty-five years, from memory and not from any maps or official reports or memoranda made by him, the elevations of various parcels of land within 1/10 of a foot.

Inherent Unreliability of This Evidence.

Being unable to withstand the test of cross-examination he, like respondent's counsel, would have us accept his present recollection of his 1904-1908 conclusions in lieu of the supporting facts. He undertook to say that certain land was below 5.1, 4.3, etc. But this is how he did it: At first he said that he walked over the land when the tide was at known height [R. 316, 317], then he confessed that they were "heights he now remembers approximately" [R. 318], and referring particularly to 1906 "that he simply recollects his conclusions from the examination" [R. 338]; referring to 1908 "that he does not recall how it was that he got his comparison of the land heights with the 4.3 elevation; that he remembers his conclusion and that is all." [R. 338.] Having in this uncertain manner picked a tidal height and having professedly carried it in mind (presumably making mental corrections for the march of the tide which happened to be in progress at the moment) he determined, so he tells us, the elevation of the land by estimating the height of the water on his leg as he

walked over the island. [R. 316, 337, 338.] But he said in his deposition:

> "Did you determine the land elevations by reference to the water as it then existed on the ground? A. Yes, but not as to the depth of the water; simply to note that the land was below water at the time" [R. 340],

his heights being now remembered only approximately. [R. 318, 337.]

He also stated that this northwesterly portion of the Island was covered with glasswort [his upland grass, R. 334] and that it was ankle high to knee high [R. 332] and that the wild rice on the same portion of the island grew as high as his shoulders or head [R. 332]—his claim being that the wild rice grew below high water mark. [R. 332.] Fitzgerald, who classifies salt grass and glasswort as the same thing [R. 377], says that wild rice did not grow on this northwesterly portion of the island, that it was all salt grass. [R. 377.]

But, according to Mr. Hughes, he waded around in grasses up to his shoulder or higher, in water whose elevation he said he knew (but did not undertake to tell how he ascertained it), and ocularly determined land elevations by guesswork as to the height of the water on his leg away down in the midst of the thick growing grasses. Nowhere does he undertake to say how high the water was in any instance or the subtraction he is supposed to have made in order to arrive at a land elevation. This testimony obviously cannot be accepted at par and be made the measuring rod for determining title to highly valuable acreage or serve as a substitute for the official survey upon which that acreage was patented by its then owner, the United States Government.

The witness actually comes to rest upon the proposition that when the water was at a given height certain areas were submerged. For example, referring to the northwesterly portion of the island, he said that in 1904 it was below "what I understood mean high tide to be" [R. 317, 318]; this is elsewhere shown as 5.8. [R. 334, 335, 339.] Again he said that the island was severed into two parts when the water stood at 5.0 [R. 319] which necessarily concedes that the portions north and south of the slough to which he referred would be higher than the 5.0 or there could be no severance—all would be submerged otherwise. But perhaps this is what he actually meant, for he says that the portion north of the slough was entirely covered with water when it stood at 5 feet [R. 319] and when at 4.7. [R. 328.] He also said that Turner's high water mark was covered by a 5.1 tide. [R. 331.]

At best the Hughes testimony can be construed to mean that when the water was at 4.7 or 5.1 (according to his datum plane and assuming he actually knew the height of the tide) the northwesterly portion was covered with water. But, the testimony shows that this does not place the land below the specified elevation because

> "if you have a 5 foot tide, ordinarily on the shore of the ocean, the water would run up very much above the elevation 5.0; in other words, the natural process of the water itself is to be affected by such things as wind, waves, capillary attraction, etc., so that the actual water will run higher than the exact theoretical elevation of the given contour." [Fitzgerald, R. 378-9.]

Nor must it be forgotten that Hughes' measurements are all related to the 1875 datum plane [R. 336-342] which we have above discussed. Hence, his water elevations are all too high, to an unknown extent.

The Hughes Photographs.

The effort to support this testimony by photographs taken on November 5, 1908 [R. 327], just after the starting of the tide land suit [R. 63] proved abortive. These photographs (Exhibit 10, Book of Exhibits, p. 12) were taken from a distance of one-half mile to one mile [R. 341], Mr. Hughes relying at the time upon the reports of an unnamed person as to the tidal heights involved [R. 342], the correctness of whose observations and reports has been treated by respondent as so inconsequential as to warrant no consideration or supporting proof. Moreover, the photos were taken under conditions calculated to distort them in that they disclose upon their faces that the supposed height of the tide ranged from 5.2 to 4.6 during the photographing period. Particularly unreliable is the portion relating to Mormon Island (see Exhibit 11), the photograph having been split at that point [R. 327]; Exhibit 11 purports to show Mormon Island with one-half of it subjected to a 4.8 tide and the other half at 4.7. (Book of Exhibits, p. 13.)

Actually these photographs disclose nothing except, perhaps, the fact that there was an island there. Apparently the attempt was to show the nature of vegetation but the trial judge agreed with counsel for petitioners that from this standpoint the photographs were wholly meaningless. [R. 327-8.] Likewise the attempt of Mr. Hughes to identify the slough which is supposed to have severed the island proved to be but guesswork. [R. 341.]

Actually these photographs have no probative force whatever, for they are not susceptible of any inference of fact.

The So-Called Slough.

The stress which was laid at the trial upon the so-called slough severing the island is out of all proportion to the importance of this minor topographical feature. Apparently it is a challenge to the correctness of the Norway survey and reflects the notion that he should have shown two islands instead of one. But if a slough such as described by respondent's witnesses existed at that time, Norway properly crossed it over as a matter of customary and proper surveying.

In *Mercantile Trust Company,* 49 L. D. 663, the assistant secretary, speaking of a swamp land survey, said in part:

> "* * * The survey accomplished the purpose of division of the high land from the low land with approximate and reasonable accuracy, and, as stated by Justice Miller in United States v. Vallejo (68 U. S. 658), in this class of cases a large discretion must necessarily be left to the surveyor, and it is not appropriate to consider whether the survey was accompanied with the nicest discrimination, or the highest wisdom."

De Cambra v. Rogers, 189 U. S. 119, 122:

> "It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

The propriety of crossing the mouth of Mission Creek in bounding land by San Francisco Bay was one of the

major points involved in the *Knight* case, *supra*. In the prevailing opinion Mr. Justice Lamar said at page 182:

> "Moreover, the method of running the shore line of the bay of San Francisco, adopted by the Von Leicht survey, was approved by the Circuit Court itself in Tripp v. Spring, 5 Sawy. 209; and on this point we entertain no doubt."

Mr. Justice Field in the same case at page 207 said:

> "In addition to this fact it may be observed that at the time the Circuit Court was not ignorant of the universal rule governing the measurement of waters, to which the Supreme Court of the state makes no reference in its decision, and of which it seems to have been entirely oblivious, that where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland. The existence of tide lands in the intersecting water in no respect affects the result."

See, also, in this connection *People v. Morrill*, 26 Cal. at 355, wherein the proper treatment of the little channels which thread the "salt marsh" is discussed.

In 2 L. D. 349 is quoted a letter of June 8, 1883, from the superintendent of the U. S. Coast and Geodetic Survey which shows the practice of that department to have been the same as in the Land Department.

The testimony of Hughes and others that they rowed through this slough at half tide [R. 319, 376, 385] [which was supposed to be 3 feet; R. 329, 376], but not at low tide [R. 340], merely shows that the land north of the slough was higher than 3 feet, but does not show how much higher. [Hughes, R. 340; Turner, R. 302.] Turner

said it was a "hogback" gradually rising from the grass line. [R. 300.] And there seems to be a general agreement that it took a 5-foot tide to cover this northwesterly portion, or at least a 4.7 tide [Hughes, R. 319, 328; Fitzgerald, R. 378; McLaurin, R. 386], which, of course, argues that the land was higher than the elevation mentioned because the water actually runs beyond the exact height of the tide. [R. 378.]

Restoration of Norway Survey.

The testimony as to the Hughes restoration of the Norway survey in 1904 [R. 328] was received over appropriate objections. [R. 328-9.] He stated that he had made such restoration in March, 1904; that he "drew lines upon the ground which I *considered* would have been coincident with the Norway lines" [R. 328], basing the same upon certain data mentioned by him. The method of doing the work was not detailed. What appear to be the memoranda made by him as a part thereof are included in Exhibit 9, which was received [R. 307] in the face of valid objections. [R. 307.] No testimony is given to the effect that these memoranda are correct or that the work was accurately or faithfully done. However, it affirmatively appears [R. 309] that Hughes did not locate meander corner No. 1 by courses and distances, as had Norway [R. 683-4], but that Hughes relied upon hearsay and his own deductions. He states the net result of his restoration to be:

> "All the corners as restored by me were below ordinary high-water mark.. Those on the east and south and north being at about half tide level. That would be an elevation of about three feet above the plane of mean lower low water." [R. 329.]

In this connection it will be noted that the detailed memoranda which purport to be the record of his restoration [R. 309-312] say nothing whatever about elevations, except the reference at R. 309 to "present (1904) high-water line." This reference, together with the other evidence, shows that the Hughes testimony, when analyzed, related to the "ordinary high-water mark" in which he was *then* interested, namely, 5.8—not the 5.1 which was later claimed by him to be mean high tide elevation or the 4.7 which is now officially established. He not only understood in 1904 that ordinary high-water mark or mean high tide line was 5.8 above the datum [R. 330, 334-5], but he was actually *contending* for it as late as 1910. [R. 335, 339.] His statement that all the corners as restored by him were "below ordinary high-water mark" obviously referred to his 5.8 mark. This is shown by his reference to half tide level as being about 3 feet above the plane of mean lower low water. Half tide level is defined at page 67 of Special Publication No. 135, Appendix hereto, as follows:

> "The plane of half-tide level, or mean tide level, as it is sometimes called, is defined as lying exactly halfway between the planes of mean high water and mean low water."

The witness does not say that he then noted any elevations or any facts other than his claim that the land lay below what he understood to be high water mark—5.8. Moreover, he made no allowance for the fact that half tide level lies half way between mean high water and mean "low water." Now the plane of mean *low* water is the average of all the lows while the plane of mean *lower low* waters is, as the phrase indicates, the mean of only the lower of the lows. While the mean of the lows is the

datum plane on the Atlantic coast the mean of the lower lows is the datum for the Pacific. (See p. 109 of said Publication No. 135; also, explanation of "L. L. W." in Exhibit 23, Book of Exhibits p. 23.) Reference to another official Federal publication, "Tidal Bench Marks, State of California," Special Publication No. 141, discloses at page 8 that there is at San Pedro exactly 1 foot difference between the mean of low water and the mean of the lower lows. Hence, it seems manifest that Mr. Hughes placed half tide level too low, even assuming his 5.8 to be correct.

It is impossible to ascertain whether his error lies in saying that the corners were "at about half tide level" or that that level is 3 feet "above the plane of mean lower low water." Certain it is that there is an inherent inconsistency and latent error in his conclusion, which, for aught that appears, was first reached some twenty-nine years after his restoration of the Norway survey. If he actually had in mind an elevation of 3 feet above the plane of mean low water then his corners would be placed at an elevation of 4 feet, which, it is now established, is 1/10 of a foot above the mean of neap tides.

Misapplication of 1875 Datum.

Moreover, it should be remembered that all Hughes' elevations are infected by the error of applying the 1875 datum plane to 1904 conditions and that this error is undefined and undefinable in extent.

Effect of Flood Erosion.

We have already adverted to the manifest injustice of permitting titles to be overthrown by this unreliable sort of evidence, and we would again emphasize the fact that it cannot fairly be given any weight whatever against the formal official survey.

But should it be conceded that the Hughes statements in this regard are correct and that the meander corners of the Norway survey as restored by the witness were but 3 feet above the datum plane of mean lower low water, it does not follow that the City's case is established or that the evidence furnishes any legal support to it. For it leaves us in a situation where the record is equally susceptible of opposing inferences.

While the City contended that there had been no changes subsequent to 1880 [R. 322] which would affect boundaries and elevations, defendant did not acquiesce in this [R. 323]. On the contrary it was developed from Mr. Hughes that there had been heavy floods in the San Gabriel and Los Angeles Rivers between 1880 and 1899, during which period the waters of these rivers emptied in part into the inner harbor [R. 346-7]; that these floods were in 1884 and 1889;

> "that they are recorded as very heavy floods which, from evidences the witness was able to gather, he thinks exceeded the floods of 1914 and 1916; that he found that the last mentioned floods resulted in a very heavy silting in the upper end of the harbor." [R. 347.]

It was further shown, by reference to the Turner map, Exhibit 4, that

> "the channel would be indicated by the soundings shown in the corner of the map and the general course of the stream would be indicated in the same manner; that a heavy flood would come from the northeast corner of the map and the general sweep of it would be diagonally across the map and *the north end of the Island would be directly in the path of attack.*" [R. 347.]

The Sea and Flood Waters as Common Enemies.

This raised an inference that the northerly end of the Island had been so scoured by flood waters between the time of the Norway survey, on the one hand, and the Turner survey and Hughes restoration, on the other hand, as to make applicable the doctrine that one whose land has been lost by violent and sudden action of the sea or flood waters of a stream may recapture or restore it by artificial means, such as bulkheads, filling, and the like. The sea, like flood water, is a common enemy, to which like rules of resistance apply. See

Gould on Waters, p. 317;
Lamb v. Reclamation District, 73 Cal. 125;
McDaniel v. Cummings, 83 Cal. 515, 520;
Barnes v. Marshall, 68 Cal. 569, 571;
Horton v. Goodenough, 184 Cal. 451, 453;
Hellman Commercial Trust & Sav. Bank v. Southern Pac. Co., 190 Cal. 626, 635;
Gulf C. & S. F. Ry. Co. v. Clark, 101 Fed. 678, 680-1 (C. C. A. 8th Cir.);
Slater v. Fox, 12 N. Y. Sup. Ct. (5 Hun.) 544, 545;
King v. The Commissioner of Sewers for Bognor, 6 Law Journal (King's Bench) 338-342.

The Doctrine of Submergence and Reappearance.

Indeed, the Hughes evidence would carry the inference that the doctrine of "submergence and reappearance" is applicable. It is thus stated in 45 Corpus Juris., Sec. 205, page 534:

> "Reappearance of land after Submergence or Erosion. Where, after submergence, the water disappears from the land, either by gradual retirement or elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation or boundary lines, the proprietorship returns to the original owner, and while the principles governing the acquisition of land by accretion or reliction have a bearing upon the case, they are not strictly determinative of the controversy."

See, also:

Hughes et al. v. Birney's Heirs et al., 107 La. 664, 670;

Mulry v. Norton, 100 N. Y. 424, 434;

Matter of the City of Buffalo, 206 N. Y. 319;

Stockley v. Cissna, 119 Fed. 812, 831-2 (C. C. A. 6th Cir.);

Widdecombe v. Rosemiller, 118 Fed, 295 (C. C. W. D. Mo.);

State of Kansas v. Meriwether, 182 Fed. 457, 460;

Payne v. Hall, 192 Ia. 780, 783;

Chicago Real Estate Board v. Mullenbach, 184 Ill. App. 437, 438;

Randolph v. Hinck, 277 Ill. 11, 13-14;

Van Deventer v. Lott et al., 172 Fed. 574 (C. C. E. D. N. Y.).

RECLAIMING OF ISLAND AN ABANDONMENT OF ASSERTED TIDELAND TRUST.

This evidence should be considered along with the assertions of counsel for plaintiff as to the "filling" of the Island in 1909 [R. 320] and the testimony of Mr. Merwin at R. 389 to the effect that the filling of 1909 was an incident to the dredging done

> "in order to enable the closing of the then existing channel at the north end of what we now call Mormon Island Peninsula. It was done to comply with orders of the War Department." [R. 389.]

This shows as a matter of law an improvement—a "reclaiming," if you please—of Mormon Island as an incident to and in furtherance of navigation under circumstances which amounted in law to an abandonment of the tide land trust and converted any previously existing rights of the state into proprietary rights held in its private capacity, like swamp lands, as distinguished from its trust ownership of tide lands. [Contention found at R. 200, 326.] The authorities are plainly to this effect:

Mission Rock Co. v. United States, 109 Fed. 763, 769 (C. C. A. 9th Cir.);

United States v. Mission Rock Co., 189 U. S. 391, 406;

City of Santa Cruz v. S. P. Ry. Co., 163 Cal. 538, 551-2;

People v. California Fish Co., 166 Cal. 576, 585-6;

Eldridge v. Cowell, 4 Cal. 80, 87;

Forestier v. Johnson, 164 Cal. 24, 31;

People v. Kerber, 152 Cal. 731, 736;

Boone v. Kingsbury, 206 Cal. 148, 189.

Oral Evidence of Alleged Elevation of Supposed "Original Surface" of Shell Parcel.

This Evidence Inherently Unacceptable.

Addressing themselves wholly to the central portion of the Island now under lease to the Shell Oil Company [R. 387] the witnesses Merwin and Wakeman undertook to detail what they found as the result of sinking trenches in June, 1933 [R. 390], concerning "what they are *pleased to call* the original surface of the soil" [as it is phrased in the Wakeman testimony, at R. 390], or as Merwin put it: "what he *considered* to be the original surface of the soil" [R. 387] or "*conceived* to be the original surface." [R. 388.]

Merwin said that he there found evidences of rice grass and salt wort [R. 387] but he "could not vouch for the accuracy of the identification of the vegetation which he located." [R. 389.] Wakeman, City Chemist or Testing Engineer, was present at the excavating [R. 390] and testified to soil stratification marked by plant life. [R. 390.] He found by chemical analysis differences in the layers of soil [R. 390] but made no such test of the plant life [R. 391] and

> "is not a botanist and not qualified to define the plant life which was found; that he could not name the different grasses or plants." [R. 391.]

Merwin further stated that he "could not vouch for * * * what he determined to be the original surface of the soil." [R. 389.] This is the sum total of testimony concerning the identification of the "original surface."

Having thus guessed at his basic fact, Merwin took elevations, by transferring levels from the bench mark near

the Southern Pacific Depot in Wilmington, whose elevation was supposed to be 9.37 feet above the datum [R. 387], a starting point for which he could not vouch (and no one else undertook to do so). Concerning this he said:

> "That he meant on direct examination that the elevation 9.37 was that of the bench mark as last examined by him, but that he had heard that *certain of the recent earthquakes or possibly a movement before that had made some change in that bench.*" [R. 388.]

Upon this uncertain basis of an assumed original surface and an unreliable bench mark he undertook to state, to minute fractions, the elevations of the remains of plant life so found by him. His Exhibit 17, reflecting the respective trenches and elevations, was not included in the transcript [R. 388] but the elevations are there stated. [R. 388.] They are twenty-one in number and only four of them are as low as 3.9 feet, the mean of the neaps. Test hole No. 12 is 3.8; it appears, from Exhibit 25, to be in the slough of Hale and Hughes; No. 104 is 3.7 and is located right on the high water mark as shown on Exhibit 25; Nos. 108A and 108B, 2.7 and 3.6, respectively, are shown by Exhibit 25 to be situated just outside the Hale-Hughes slough, and would probably be within the same had it been carried northwesterly as on the Turner map, Exhibit 4.

Respondent Piles Inference Upon Inference.

Obviously the attempt of counsel was to establish that the surface of the Shell parcel was below mean high tide (assumed by plaintiff to be 5.1 rather than 4.7) and inferentially the conclusion that the same or similar elevations of less than 5.1 applied to the Borax parcel on the north. This is a violation of the well settled rule that inference cannot be built upon inference, nor presumption upon presumption, and that a finding which rests upon such attenuated basis must be rejected for want of evidentiary support.

> "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible." (*U. S. v. Ross*, 92 U. S. 281, 283.)

See:

> *Union etc. Co. v. San Francisco Gas etc. Co.*, 168 Cal. at 62.

Hypotheses Favorable to Petitioners Not Excluded.

Assuming, for the purpose of argument, that this evidence places the elevation of the original surface of the Shell parcel below high water mark in 1933, the showing still leaves it entirely problematical how the elevation got below the established mean high tide (4.7, not 5.1). It is *at least* equally consistent with the elevation having been higher in 1880. The greatest depression below 4.7 (exclusive of the one low spot of 2.7 in the "slough") is .9 foot in extent. The witness found only "remains of vegetation" [R. 387], elsewhere described as "roots of vegetation" [R. 387, 390] and "stems of the rice grass" [R. 387, 390] in a little layer of clay [R. 387] such as a flood might have laid down. The effect of scouring floods

(such as those mentioned by Hughes) is by no means excluded by this evidence; if that is the explanation, the cases cited, *supra*, at pages 182-4, become operative.

Nor is this other explanation excluded, which is suggested by plaintiff's own evidence: The Island "was not a rocky island in any respect" (as it was stated to be in the DeGuyer opinion, later discussed) but was *"a sort of a soft land* except a little ridge in the south part which was a little sandy." [Hughes: R. 333.] It is not disclosed what was the exact nature of the subjacent support, but it does appear, in Exhibit 24, that the dredging frequently encountered quicksand. [R. 622, 590.] Though the channel on the west was "the usual steamboat channel of depth sufficient for navigation at all stages of the tides" [Norway: R. 685], that on the east was only about 10 feet average depth [Norway: R. 685], and about 150-200 feet wide [Norway: R. 685]; the 1909 and subsequent work resulted in channels on the west and east which are each 600 feet wide and 35 feet in depth. [R. 389.] Coincident with the removal of this subjacent support the dredged material was dumped on top of the Island, making a heavy overburden in the nature of a blanket which Mr. Merwin said was from 4 to 6 feet in depth [R. 388], and made a present surface elevation of "several feet above mean high tide, whether one takes the figure of 5.1 or the figure 4.7." [R. 389.] The natural tendency of all this—removal of side support and dumping it on top of this soft Island was to cause the Island to slump and flatten and its soft base to broaden. This was accelerated in 1922-23 by the improvements which were placed thereon by the Shell Oil Company. They consist of eleven storage tanks, some quite large (see Exhibit 25), which are 20 feet high and when filled with gasoline weigh

over a ton per square foot [R. 389]; also there were four buildings placed on the same parcel. [R. 389.] To this must be added the weight of numerous concrete walls, shown on Exhibit 25. On the Borax parcel, as it appears from the Hale testimony [R. 632] and from Exhibit 25, there is a heavy three story concrete building just north of the boundary line, and other improvements such as engine house, etc.,—all of which have added their weight and depressive force to the improvements on the Shell parcel. The natural inference is that the combined effect of all these things—removal of subjacent support, converted into heavy overburden on the top of the Island—caused a slumping sufficient to account for the slight depression below mean high tide line which is claimed by plaintiff. If this were not so, the burden rested upon plaintiff to so show and no attempt was made in this direction.

Moreover, as previously pointed out, this evidence, even if accepted with plaintiff's construction on it, shows the Island's "original surface" to be *now above the mean of the neaps*—the only average or theoretical line which has been recognized by the courts as a legal boundary.

CUMULATIVE EFFECT OF RESPONDENT'S EVIDENCE.

Attempting to give to plaintiff's claims specific application of its evidence of the location of high water mark, we find the record in a strange state of contradiction and confusion. The net result of plaintiff's evidence leaves not only uncertainty but actual contradiction of such a nature that it cannot be accurately ascertained what the plaintiff really claims. Having produced the Turner map, Exhibit 4, with its high water mark based upon the first day's survey, plaintiff proceeded to introduce Exhibit 5, which is the Hale-Hughes plotting of the

Turner notes, with its rejection of the high water mark of Turner's map. Having thus built up, through a rejection and reverse interpretation of a large part of the notes, a new high water mark which is shown on said Exhibit 5 by a heavy blue line, plaintiff's star witness, Mr. Hughes, on direct examination, over objection [R. 331], testified with reference to the said heavy blue line of Exhibit 5:

> "I noted that Mr. Turner's lines embraced a somewhat wider area than the area which was above that stage of the tide.
>
> * * * that the lines which would be established on the ground as high water mark by the Turner survey were covered with water when the tide was at an elevation of 5.1 feet above the datum plane. That means that Mr. Turner followed a line which was somewhat lower than 5.1 feet in elevation, that is to say, that at the 5.1 elevation of tide there was a strip which was above water and that strip was in the same position as the strip bounded by the heavy blue lines but a little narrower." [R. 331-2.]

And on cross-examination:

> "that there was not as much land on Mormon Island above the line of mean high tide as shown on the Turner survey." [R. 343.]
>
> "that he, in 1900, had found the strip of land above high water mark to be narrower than that shown in the Turner notes and narrower than the land included within the heavy blue line on Exhibit 5, which he had helped Mr. Hale make; that he had concurred in the location of the heavy blue line on that map and that means that he, the witness, thinks the Turner map was wrong." [R. 344.]

Mr. Fitzgerald produced the Desserey map upon which the complaint counts. Mr. Hale depicted upon Plaintiff's Exhibit 2 what he conceived to be the outlines of the disputed area as well as the portion conceded to be upland, the latter being shown in white. [See R. 218-219; Book of Exhibits, p. 1.] This was supposed to show the 5.1 contour of the Desserey survey. Mr. Butts conceded that defendant owned all land within the heavy blue line of Exhibit 5 [R. 379]—thus repudiating the Hughes testimony above quoted—and this was immediately preceded by Fitzgerald's testimony that

> "the 4.8 contour line as shown on the map made by the witness is the one which nearly coincides with the heavy blue line designated as the high water mark on Plaintiff's Exhibit No. 5; comparison of the shape of the 4.8 contour on Exhibit 14 shows that it is a different shape from the heavy blue line on Exhibit 5; that it does not coincide exactly but does have points of coincidence; that the 4.8 contour of Exhibit 14 coincides more closely than the 5.1 with the heavy blue line of Exhibit 5. Referring to Plaintiff's Exhibit 2 and the outlines of the white parcel surrounded by buff, the 5.1 contour of the witness' map would be inside of that outline in most instances." [R. 379.]

Mr. Butts' statement therefore rejects the Fitzgerald testimony as well as that of Hughes. And the net result is that plaintiff's counsel conceded defendant's ownership of more upland than his witnesses conceded to exist, counsel standing upon an outline or contour which they rejected.

Counsel for plaintiff rejected the evidence of the witnesses and rested his case upon the rejected high water mark contour of Exhibit 5, which no witness claimed to coincide with the complaint description or with the 5.1 contour of the Desserey map.

Admissions of Plaintiff Sufficient to Sustain Finding Against Tideland Claim.

But if all the oral evidence (and indeed the documentary) were to be accepted at par and with respondent's construction thereon, nevertheless the court's finding that the demanded premises were never tide land could not be now overthrown. It is fully supported by admissions of plaintiff which are competent and which of themselves are sufficient to sustain the finding.

We refer particularly to the license agreement of March 28, 1928 [R. 103-108] the map attached thereto [R. 108] and the subsequent license of September, 1928. [R. 60.] The earlier agreement is summarized at pages 20-21 hereof. Its recitals of ownership by defendant of premises particularly described according to the Norway survey, plaintiff's acquiescence in that title through entry and occupation in subordination thereto, its *agreement to surrender the premises upon termination of the license*, all fortified by the delineation of the map, constitute affirmative and unequivocal admission of defendants' title to the disputed area which are, as we have said, sufficient in and of themselves to support the finding against the claim of tideland—unless perchance admissions of City officials can have no weight.

The authorities bearing upon this point are cited at page 97, *supra*.

Equally binding upon plaintiff is the admission of the allegation that the compromise agreement concerning Tideland Location 152 had attached to it a map prepared by the Harbor Department on which "said Tideland Location 152 is shown as adjoining said Mormon Island on the north and east and said Mormon Island is likewise shown, being delineated exactly in accordance with the Norway Survey". [R. 67.]

DeGuyer v. Banning Discussed.

Justice Field's summation of this case, reported in 167 U. S. 723, is quoted, *supra*, at page 56.

Respondent has continuously sought directly and indirectly to capitalize from an evidentiary standpoint the statement of facts contained in the *DeGuyer* opinion. It there appeared that the decree confirming the grant of the San Pedro Rancho was so phrased as to include Mormon Island within its limits, but the plat which was made pursuant thereto and to which reference was made in the patent contained an "inner bay exception", which excluded from the San Pedro grant the said Mormon Island. The question presented was whether the decree or the survey and plat should control. This court definitely held that the patent with its plat controlled "the decree of confirmation and that Mormon Island was not included within the San Pedro grant". This left it a part of the public domain and subject to the Banning patent. Although this last point was not there decided, it is covered by admission [R. 44, 111] and finding [R. 165-6] at bar.

Banning's Alleged Admissions Not Competent.

Respondent sought to introduce in evidence the "statement on motion for new trial" in this case, containing certain statements of Banning which, though not then opposed to his apparent interests, now look like admissions; said statements are quoted in the *DeGuyer* opinion. The court excluded the statement for the reason, among others, that there was no competent showing that Banning had so testified. [See R. 371, 373-4; 631.] Indirectly, the same end was sought to be accomplished in respondent's brief in opposition to certiorari, through reference to the statements of fact in the opinion. And the effort will doubtless be renewed in respondent's forthcoming brief.

But it is elemental that statements of fact in a judicial opinion are not competent evidence thereof for any purpose except the particular decision; they are not even binding upon a retrial of the same cause. Court opinions establish the law, not the facts. (*Mackay v. Easton,* 19 Wall. 619, 632; *Virginia etc. Coal Co. v. Charles,* 251 Fed. 83, 118.)

Were it conceded that court decisions are evidence of facts in subsequent causes, the *DeGuyer* opinion would necessarily be disregarded here for, treated as an admission, it fails in the essential element of being opposed to the property interests of the declarant.

Weber v. Chicago etc. R. Co., 175 Iowa 358, 384;

Donnelly v. United States, 228 U. S. 243, 273;

Boyd v. United States, 30 Fed. (2d) 900, 901 (9th C. C. A.).

Perusal of that opinion discloses that the issue turned upon the question of whether Mormon Island was "covered by the navigable waters of the inner bay of San Pedro" and thus within the scope of the "inner bay exception" of the patent to the San Pedro Rancho. Banning's defense depended upon bringing his island within this description without wholly relinquishing its status as an island and the subject of Government patent. To this end it seemed to his advantage to minimize the area of the island uncovered at high tide and to make the upland area appear as insignificant as possible. The witness had strong incentive to then state facts in derogation of the Norway survey. The *sine quo non* of an admission was absent. His proprietary and pecuniary interests would apparently be advanced by statements so made by him, and the one element supplying the sanction of the oath was entirely absent.

The force of these observations is illustrated by the fact that the *DeGuyer* opinion apparently followed the California Supreme Court's description of the island as consisting at high water "of a pile of rocks, covering not much more than an acre" (167 U. S. at 735). But it was proved as a fact at the trial of this case "that at the time he (Hughes) first saw the island it was not a rocky island in any respect, but was a sort of a soft land". [R. 333.]

Moreover, the admissions of a predecessor in interest are not competent to strike down record title.

Dodge v. Freedman's Savings and Trust Company, 93 U. S. 379;

Frink v. Roe, 70 Cal. 296, 313-20;

Hamilton v. Consolidated Water Co., 56 Cal. App. 7, 11-12;

Jones Commentaries on Evidence, Second Edition, Vol. II, Sec. 914, p. 1685.

It is also true that the declarations of an owner, though admissible in other respects, are not competent against a subsequent purchaser who acquires the property without knowledge or notice of such admissions.

The theory of the recording acts, reflected in their express provisions, is that the title to real property shall be deducible from the public record provided for that purpose and that a grantee is chargeable with notice of only those things which appear in his chain of title upon the records.

66 *Corpus Juris,* Sec. 969, p. 1132;

Pine v. French, 83 Cal. App. 276;

Hamilton v. Consolidated Water Co., 56 Cal. App. 7;

Davis v. Ward, 109 Cal. 186;

Harney v. Wirtz, 30 N. D. 292, 303;

2 *Pomeroy's Equity Juris.* (Fourth Edition), Sec. 654, p. 1290.

There is a presumption that the grantee is an innocent purchaser with respect to any matters not appearing of record (66 *Corpus Juris,* Sec. 1062, p. 1197), the burden of overthrowing which rests upon the other party to the action (66 *Corpus Juris,* Sec. 1063, p. 1198; *Grogg v. Stevens,* 6 Fed. (2d) 862, 863, 4th C. C. A.)

The record at bar discloses the chain of title [R. 660, 688-690]; the alleged admissions of Banning could not possibly appear in it. Moreover, the record affirmatively establishes that the defendant had no knowledge or reason to believe any of the things stated in the alleged Banning admissions. It is alleged in the answer [R. 55] and admitted in the reply [R. 117],

> "That defendant Borax Consolidated Limited at the time of purchasing the said parcel described in Exhibit 'B' and at the time of accepting said deed, believed that the whole of the land therein described was upland and that none of it was tideland and defendant had no reason to believe that any portion thereof was tideland." [R. 55.]

It would be a travesty upon justice to permit such unrecorded and unknown admissions to qualify the public records upon which defendant was entitled to rely, and did rely, in acquiring its title, and thus to inject into that title weaknesses which the buyer not only did not know of but which it could not with reasonable diligence have discovered.

Henderson v. Wanamaker, 79 Fed. 736, 738 (C. C. A. 8):

> "Complaint is made that the court below admitted evidence of declarations made by Baker *before he conveyed to the plaintiff* to the effect that he had previously conveyed his title to Clifford, and had no interest in the property in dispute. But the admissions of a grantor against his interest, made while he held all the title that his grantee has acquired or relies upon, are always admissible against the latter, *unless he is protected by his character of an innocent bona fide purchaser, as the plaintiff here is not.* (Baker v. Humphrey, 101 U. S. 494, 499.)"

See, also:

22 Corpus Juris, Sec. 412, pp. 356-357;

Root v. Wadhams, 35 Hun, 57 (N. Y.);

Farmers' Bank v. Douglass, 11 Smedes & M. (Miss.) 469, 545;

McElfratrick v. Hicks, 21 Pa. 402;

White v. Moss, 92 Ga. 244, 247.

We would again remind the court that this unreliable matter cannot be indirectly injected into this case through reference to the opinion of the Supreme Court, for, under the authorities, a court opinion decides law issues, not facts, and is no evidence of the latter.

POINT VII.

The Circuit Court of Appeals Erred in Failing to Hold That the Admissions of the Pleadings Establish Facts Which Estop Respondent From Asserting the Locus in Quo to Be Tideland.

(Specification of Error No. 8.)

The pertinent admissions of the pleadings are collated at pages 18-21 hereof. See discussion at R. 193-197.

The Circuit Court of Appeals refused to consider this contention of petitioner, saying at R. 723:

> "Their contention that the facts stated in the counts setting up estoppel *in pais* and by judgment are sufficiently admitted by appellant's reply to justify a decree in their favor, will not be considered in view of the fact that the question was not presented to or considered by the trial court."

But the issue was certainly brought to the trial judge's attention [R. 193-197]. Logically, it should make no difference whether the issue was raised in the trial court in exactly the same manner as in the appellate tribunal. If for any reason the judgment is shown to be correct, it must be affirmed, regardless of the mental processes by which the trial judge reached that correct result (authorities, page 134, *supra*).

Such cases as *Peck v. Heurich*, 167 U. S. 624, 629, are in point. It is there said:

> "A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. Deery v. Cray, 72 U. S. 5 Wall. 795, 808 (18:653, 657); Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 103 (30:299, 300); Jones v. Sisson, 6 Gray, 288; Jones v. Wolcott, 15 Gray, 541."

From this it necessarily follows that there will be an affirmance when it clearly appears that the judgment is correct according to the appellant's own admissions of record, and this regardless of whether the point was raised in the trial court.

See, also:

Indiana Farmer's Guide Publishing Co. v. Prairie F. P. Co., supra.

ESTOPPEL WILL RUN AGAINST MUNICIPALITY.

City of Los Angeles v. Cohn, 101 Cal. 373, 374, 375, is directly in point. It held the municipality estopped to claim title to a portion of a public street upon which it had permitted the erection and maintenance of a private building. When it is recalled that a City's title to its public streets is but a trust for the benefit of the public at large (*Ex parte Daniels,* 183 Cal. 639; *People v. County of Marin,* 103 Cal. 231; *Terminal Rys. v. County of Alameda,* 66 Cal. App. 81) it will be readily perceived that the principle of the decision is fully applicable to the claim that property is subject to a tideland trust.

Sacramento County v. Southern Pacific Company, 127 Cal. 217, is to the same effect.

The doctrine has been recently extended in California by the case of *The Times-Mirror Co. v. Superior Court,* decided April 19, 1935, and at this date appearing in the official advance sheets of the court, 89 Cal. Dec. 635, and in 44 Pac. (2d) 547. The City of Los Angeles was

held estopped to abandon a condemnation of the building occupied by The Los Angeles Times (which condemnation was started as a part of a civic center project), because the owner had justifiably and in good faith constructed at large cost a new building on another site in the belief that the first parcel would be ultimately condemned. At page 651 of 89 Cal. Dec. (Pac. p. 559) the court gave the gist of the facts as follows:

> "It unquestionably appears from the foregoing that petitioner in good faith constructed the new building upon the understanding that the site of the old building was included in the civic center plan and it was necessary from the nature of the business in which it was engaged that it should prepare in due time to relocate its plant. That it was justified in so concluding and that the city is bound by the rules of equity to prosecute said condemnation causes to final judgment seems wholly within the realm of reason."

At pages 647-649 of 89 Cal. Dec. (Pac. p. 557) it adopted the rule of the *Cohn* case, *supra*, quoted extensively therefrom, and then said:

> "The unusual circumstances in this case would require the application of the doctrine announced in the City of Los Angeles v. Cohn, *supra*, even though no such precedent existed. Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. 'It has always been the pride

of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.' (Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, citing Story's Equity Jurisprudence, secs. 28, 439 1 Pomeroy's Equity Jurisprudence, sec. 60.)"

The following cases are peculiarly pertinent and persuasive:

U. S. v. Chandler-Dunbar Water Co., 152 Fed. 25, 40 (C. C. A.);

State of Iowa v. Carr, 191 Fed. 257, 265 (C. C. A. 8th Cir.).

Beadles v. Smyser, 209 U. S. 393, 402;

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 583;

Walker v. United States, 139 Fed. 409 (C. C. M. D. Ala.);

Hemmer v. United States, 204 Fed. 898, 901-2 (C. C. A. 8th);

U. S. v. Denver & R. G. Ry. Co., 16 Fed. (2d) 374, 376-7 (C. C. A. 8th);

U. S. v. Stinson, 125 Fed. 907, 909-10 (C. C. A. 7th);

Quarles v. City of Appleton, 299 Fed. 508, 516 (C. C. A. 7th Cir.);

Scott County, Ark., v. Advance-Rumley Thresher Co., 288 Fed. 739, 750, 752 (C. C. A. 8th Cir.);

Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 293-4 (C. C. A. 8th);

State of Iowa v. John A. Creighton, R. E. & T. Co., 191 Fed. 270 (C. C. A. 8th).

POINT VIII.

The Circuit Court of Appeals Erred in Failing to Hold That the Dismissal of a Former Tideland Action Involving the Locus in Quo, Made Pursuant to a Compromise, Operated as a Retraxit.

(Specification of Error No. 9.)

The propriety and necessity for consideration and decision of this question is made apparent by the authorities at pages 112 and 199, *supra*. It was discussed at R. 191-193.

The admissions of the pleadings (set out at pages 22-24 hereof) show that the former action involved the same land and the same issues as the instant case; that the dismissal was made pursuant to the express terms of the written agreement compromising the companion case which involved Tideland Location 152. In view of these admissions the other issues formed by the third defense and counterclaim and reply thereto have become immaterial.

Effect of Dismissal Pursuant to Compromise.

The law is settled that a dismissal made pursuant to a compromise agreement operates as a retraxit, is therefore equivalent to a judgment on the merits and renders the issues *res adjudicata*.

Crossman v. Davis, 79 Cal. 603, 604;

Merritt v. Campbell, 47 Cal. 542, 546, 547;

Patterson v. Spring Valley Water Co., 207 Cal. 739, 746;

McCord v. Martin, 47 Cal. App. 717, 726;

Lamb v. Herndon, 97 Cal. App. 193, 202;

Nashville R. R. Co. v. United States, 113 U. S. 261, 266;

United States v. Parker, 120 U. S. 89, 95-6;

Marshall v. Otto, (Cir. Ct. D. Nev.) 59 Fed. 249, 253;

2 *Freeman on Judgments,* 5th Ed., Sec. 757, pp. 1595-1597;

Bertelsen v. White, 58 Fed. (2d) 792, 795, (D. C. D. Mass.);

Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 650;

Virginia Shipbuilding Corp. v. United States Shipping Board, 292 Fed. 440 (D. C. E. D. Va.);

Backus v. U. S., 59 Fed. (2d) 242, 258-9.

And the rule is no different with respect to municipal corporations:

Strand Improvement Co. v. City of Long Beach, 173 Cal. 765;

Muchenberger v. City of Santa Monica, 206 Cal. 635;

Guaranty Trust etc. Bank v. Los Angeles, 186 Cal. 110, 118;

Dunn v. Long Beach etc. Co., 114 Cal. 605.

Effect of Alleged Attempt to Dismiss Without Prejudice.

The reply of plaintiff rests largely upon the allegation that the dismissal was made by stipulation of counsel "without prejudice" in accordance with the document set forth at R. 124. While proof of this stipulation was not made, and it does not appear that the judgment of dismissal was in terms "without prejudice," the stipulation, if proved, would be without legal effect upon the matters now under discussion for it dealt with a matter

which was not presumptively within the authority of the attorneys for the defendant and could not be so shown except by a written authorization running from the client to them. By that we mean to say that the compromise agreement settled and fixed in the City and the Bannings, respectively, rights and title to real property and in effect defined the boundaries thereof. The answer quotes the agreement as follows:

> "that the City shall and will, concurrently with the execution of this agreement, enter the dismissal, by the Attorney General of the State of California, of that certain action hereinabove referred to, now pending in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 64540 under the style of the People of the State of California, upon information of U. S. Webb, Attorney General, plaintiff, against the Banning Company, defendant, relating to that parcel of land known as Mormon Island." [R. 66.]

The attempted denials at R. 126 are so clearly evasive as to amount to an admission of this further allegation:

> "and it was further specifically stated and agreed in the said instrument that the grant of the said tideland location 152 by the Banning Company to the City of Los Angeles was made not only in consideration of the said thirty year lease but also in consideration of the other terms, conditions and covenants of the said agreement, which included the covenant for dismissal of the said action No. 64540." [R. 66.]

This agreement was made on July 24, 1917 [R. 65, 126]; and the dismissal was entered upon stipulation of August 6, 1917 [R. 124, 67].

An attorney's general power to manage an action or make stipulations therein does not actually or presumptively authorize him to compromise his client's cause and particularly does not authorize him to do any act which divests any of his client's title or interests in real property.

Trope v. Kerns, 83 Cal. 553;
Burns v. McCain, 107 Cal. App. 291;
Bertelsen v. White, 58 Fed. (2d) 792, 795 (D. C. D. Mass.);
Sebree v. Sebree et al., 30 Ky. L. Rep. 670;
Mackey's Heirs v. Adair, 99 Pa. St. Rep. 143, 147;
Krug v. Roberts Cone Mfg. Co., 213 Mo. App. 628;
Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 102;
6 *Corpus Juris*, Sec. 175, p. 659.

The net result of the record admissions in this regard is that the City of Los Angeles by its present action is seeking to recover something which it sold to the Banning Company on July 24, 1917.

This is not in keeping with good conscience nor with sound law.

Wherefore, it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and that of the District Court for the Southern District of California in all respects affirmed, with costs to petitioners.

Respectfully submitted,

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Of Counsel:
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